No. 86.
(Mr. Cleveland for Pltf. in Error)

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Supreme Court of the United States.

October Term, 1901.
No. 86.

LOUIS AUGUSTE MARANDE, JULES EMILIE ROEDERER AND PAUL LEON ROEDERER,

Plaintiffs in Error,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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IN THE

Supreme Court of the United States,

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THE TEXAS AND PACIFIC RAILWAY COMPANY,
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BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

Statement.

The writ of error in this case brings before this Court for review the action of the Circuit Court of Appeals for the Second Circuit in affirming the judgment of the Circuit Court which directed a verdict in favor of the defendant in error against the plaintiffs in error.

The action was brought by the plaintiffs in error (hereinafter called the plaintiffs) against the defendant in error (hereinafter called the defendant) to recover the value of 65 bales of cotton, part of a shipment of 100 bales, delivered to the defendant as a common carrier and destroyed, while in its possession, by the burning of its wharf at West-

wego, in the State of Louisiana, on Monday, November 12, 1894.

The defendant, by its answer, admitted the receipt of the cotton in suit and its destruction by fire at Westwego, but denied that the cotton was in its possession as a common carrier at the time of the fire.

By the terms of the bill of lading covering the cotton in suit the carrier was expressly exempted from liability for loss "by fire from any cause" (p. 170). Upon the trial, however, the plaintiffs contended (1) that the loss occurred by reason of defendant's negligence, and (2) that the defendant had deviated from the regular and usual course of carriage, and, therefore, had forfeited the benefit of all the exemptions contained in the bill of lading. At the close of the plaintiffs' case the trial court denied the motion of the defendant for the direction of a verdict in its favor, with leave to renew the same at the close of the testimony. The defendant, however, declined to put in any evidence, and renewed its motion for the direction of a verdict, which the Court thereupon granted (pp. 162, *et seq.*).

The action of the Circuit Court was affirmed by the Circuit Court of Appeals (pp. 207, *et seq.*).

Facts shown by the record.

The route of this cotton, as stated in the bill of lading, is from Greenville, Texas, "to the port of New Orleans, La., and thence by Elder, Dempster & Co.s, S. S. line to the port of Havre, France" (p. 170).

As appears from the map, Plaintiffs' Exhibit F (between pp. 178 and 179), Westwego, *a place not mentioned in the bill of lading*, is situated on the *west* bank of the Mississippi River, opposite the extreme upper end of the City of New Orleans, the river at this point being about half a mile wide. Westwego was in the Parish of Jefferson, and was not in the City of New Orleans.

It is conceded by defendant,

> "*as a matter of fact, that the east bank of the river in the City of New Orleans is the port of New Orleans, and was the port of New Orleans in* 1894 (p. 9),"

and it is also conceded

> "*that prior to March 20, 1896, Westwego was not within the designated limits of the port of entry, the customs district, as defined by the Act of Congress*" (p. 9), entitled "An Act to extend the limits of the port of entry of New Orleans," approved March 20, 1896, Vol. 29, U. S. St. at L., p. 72.

The dock and elevator of this defendant, which were practically all there was at Westwego (Miller, p. 18), were not completed until the spring of 1893 (p. 17), and prior to the building of this dock, there was nothing there but the levee (Perkins, p. 10). At the time of this fire there was only one house, a saloon (p. 112), within a quarter of a mile of the dock and only half a dozen within half a mile (Miller, p. 18). *It was an out of the way place* (McArdle, p. 135).

The town or hamlet nearest to Westwego on the west bank of the river was Amesville, about two miles below, consisting of one store, one grocery store, bar-room and two or three small houses. About three-quarters of a mile further down was a place called Harvey, consisting of two or three stores and some houses. The nearest village was Gretna, the Parish seat of Jefferson Parish, about three or three and a half miles below Westwego. A ferry ran across the river from New Orleans to a point near Westwego. This ferry was not there prior to the building of the dock, and to then get across you had to go in a rowboat. On the Gretna side of the river there was a mud road running up the river near the levee. That road ran back a little distance from the wharf.

There were only four or five policemen in the

whole parish of Jefferson, which had a frontage on that side of the river of twelve miles and on the other of eight or ten miles, and extended back from the river fifteen or twenty miles in some places. These officers were distributed over the parish, the one who covered Westwego having a beat five or six miles long (Perkins, pp. 11, 12 and 13).

Miller, defendant's main freight agent, says:

> "There were no policemen at Westwego, as I understand it" (p. 18).

There was no fire engine or volunteer or other fire department nearer than Gretna, in which there was a volunteer department (Perkins, p. 12; Miller, p. 18). The fire companies in New Orleans never crossed the river (McArdle, p. 138; Perkins, p. 14).

Defendant's Road and Terminals.

As shown by the map, Plaintiffs' Exhibit F, defendant's main line approaches New Orleans from the west at a point just back of Westwego, at which point it turns and runs in a southerly direction to Gouldsboro, which is about eight miles below Westwego (Map between pp. 158 and 159), and across the river from defendant's terminal in New Orleans (Miller, p. 14).

Defendant's only terminal for cotton prior to 1893 *was in New Orleans.*

From the point on defendant's main line nearest to Westwego (Map, Exhibit F, between pages 158 and 159), a branch or spur track extends to defendant's dock, making a distance of about half a mile.

Condition of the Dock on the Night of the Fire.

The dock at Westwego was about 800 feet long and about 300 feet wide (p. 18), and upon this dock on the night of this fire were stowed 20,879 bales of cotton (p. 26), and around or in close proximity to it there were 206 cars containing 8000 bales of cotton (p. 26).

This dock was the exclusive property of the defendant and was wholly within its power of management and control (Stipulation, p. 29).

This whole dock was of wood (p. 19), and upon it were erected two sheds, each about 250 to 300 feet long (p. 18) by 250 feet wide (p. 19), consisting simply of posts and a roof (p. 19). These sheds were open at the sides (p. 18), and had a sort of a cupola running along the centre of the roof and lengthwise of the sheds, which was also open at the sides (p. 19). The shed down the river was called No. 1 and that up the river No. 2 (p. 19). The distance between these sheds was 100 to 115 feet (p. 19). In the centre of the uncovered space between the two sheds was an opening in the floor of the dock 50 or 60 feet wide and not quite as long as the width of the sheds (p. 19), around all sides of which opening cotton was piled (p. 73).

Over the whole area covered by these two sheds the cotton was piled as high up as the men could put it; it was piled sidewise, and where there was not room to put a bale on its side it was headed or piled in any way it could be gotten in (pp. 73 and 78), and averaged eight and nine bales high (pp. 74 and 79). Cotton was piled in the same way in the space between the sheds. The only way in which a view through this dock could be had was to climb up on top of the cotton. The whole place was blocked with cotton (p. 84), and its condition was sufficient to cause Kent, a man of many years experience at cotton docks and along the levee, to say

> "In all my experience, and I have been a foreman on the levee for eighteen years, I never saw a place so jammed in my life, it was just piled almost to the roof and from one end of the shed to the other" (p. 105).

20,879 bales of cotton were crowded upon this dock, on the night of this fire (p. 26), "*an extraordinary amount*," says the Circuit Judge (p. 163), and the day before this fire Thorne, defendant's general

manager, was compelled to write to Satterlee, its treasurer:

> "We can unload no more cotton at Westwego until some of the cotton on hand is disposed of" (p. 201).

Along the rear of this dock and close to it, were two parallel tracks running the whole length of the dock (p. 19), and upon the dock itself, running its whole length, and between the sheds and the river, was another track (p. 19), on which cars were continually being switched in and out and unloaded upon the dock (pp. 74, 101).

On the day of the fire there were two vessels loading at this dock with cotton seed meal and cotton seed cake, which were on that day taken out of cars run in upon this outer track. As the cars were emptied they were hauled out and full cars hauled in in their place. This work was being done on the very day of the fire, and a locomotive passed the *Malabar*, lying at No. 1 shed, and went way up the dock.

See the testimony *passim* of Ellis, Nie, Stych, John Reinhard, William Reinhard, Lincoln and Kent (pp. 86 to 108), which shows that on the day of the fire a locomotive came on the track, passed the *Malabar* and went up the dock, hauling and pushing loaded and empty cars. It backed the train up the wharf, went up and backed down again, and was puffing and moving up on the wharf beyond the *Malabar*.

In addition to this it was the custom, just after the men knocked off work for the day, for the locomotive to haul out the empty cars and haul in full ones, so that in the morning the men on going to work would find full cars awaiting them (p. 74).

This vast mass of highly inflammable material, jammed together every which way, was the centre around and on which, on the night of this fire, this defendant saw fit to store 206 cars containing 8,005 bales of cotton (p. 26) which it was unable to unload

because of the crowded condition of its dock (p. 201), and somewhere on or near this dock the cotton in suit was kept for five days (p. 29). It was never unloaded, and when this fire broke out, it was destroyed.

The water supply on the dock came through a single pipe which ran lengthwise of the dock in the centre under the floor, from which were erected six hydrants, three in each shed (p. 18).

These hydrants were about six feet high (p. 75), and to each of them was attached a length of one hundred feet of hose (p. 18). On a post near each hydrant was a platform built around the post, about six inches higher than the hydrants, and on this platform the hose was coiled (pp. 75 and 81). *It does not appear what the force of the stream would be which would flow through these hydrants* from the pipe under the dock which was fed from a tank, some distance from the dock.

Cotton was piled all around these hydrants and around the posts on which the hose was kept and was piled higher than the hydrants and hose (pp. 75 and 81). *Sometimes the cotton would fall over and block the hose* (p. 85).

There were no gangways whatever through the cotton, running lengthwise of the sheds (p. 79) either connecting one hydrant with another or otherwise. It was therefore almost impossible to operate fire hose to advantage, or to carry or extend hose north or south from any hydrant. There were only three or four narrow gangways in each shed running crosswise of the sheds (p. 74). The gangways across the sheds were narrow, and were piled and crowded with cotton (pp. 74, 84).

NO SYLLABLE OF TESTIMONY WAS GIVEN TO SHOW THAT THE FIRE APPARATUS ON THIS DOCK WAS EVER TESTED. ON THE CONTRARY, IT APPEARS THAT, SO FAR AS MILLER, THE AGENT IN CHARGE OF THIS DOCK, KNEW, THE HOSE WAS NEVER TESTED SINCE IT WAS PUT UP WHEN THE DOCK WAS BUILT, ABOUT A YEAR AND A HALF BEFORE THE FIRE

(p. 17). THE MEN EMPLOYED ON THE DOCK NEVER SAW THE HOSE TESTED (fol. 128), NOR WAS THERE EVER ANY DRILL TO SHOW ANYONE HOW TO USE THE HOSE IN CASE OF NEED (p. 85). IT DOES NOT APPEAR THAT THE HYDRANTS OR THE HOSE WERE IN GOOD CONDITION AT ANY TIME SO AS TO PERMIT OF AN UNOBSTRUCTED FLOW OF WATER.

The hose was not kept in the usual way. The customary way of keeping hose was not to have it coiled or folded on platforms as at this dock, but to have it rolled on reels (p. 112) or stretched out, so that in case of need it would be instantly accessible (p. 135). Here the hose had to be unfolded or uncoiled and made free the whole of its length before water would flow through.

The dock itself was the private dock of this defendant, and permission had to be obtained from it before any one could go there (p. 59). It being inaccessible, if a fire once gained much headway in this mass of cotton no reasonable man could have expected any other result than the total destruction of the dock and its contents.

On October 21, Thorne had written Satterlee:

> "*It is so fearfully dry that it is a wonder we are not having more fires*" (p. 196).

The weather report, (pp. 118 and 119) shows that that condition still existed at the time of this fire.

A fire of unexplained origin had broken out on this very dock on October 23, which had evidently been burning half an hour before it was discovered (p. 150).

On the night of the fire, the sole guardians of this dock and of this enormous aggregation of valuable property, the cotton alone being worth over ONE MILLION DOLLARS, were TWO men from Boylan's detective agency who were detailed as watchmen on the floor of the dock, and ONE man from the agency as watchman UNDER the dock (pp. 120 and 152), and the *only* representative there in the permanent employment of this defendant was its own private

watchman Valle. Not one syllable of testimony is given to show that any one of these men had had any experience whatever in the handling of fire apparatus. It appears that Valle was only about nineteen years old (p. 152).

Colonel Boylan says that the number of watchmen on the dock was supposed to be increased according as the cotton increased (p. 124). That this was not the fact is expressly shown, for it appears that on the night of November 6, at which time there were only 19,695 bales on this dock (p. 183), and on November 7th, when there were 20,788 bales there (p. 184), there were five watchmen from this Detective Agency on duty, and on the night of this fire, when the amount of cotton was large beyond precedent, there were only three (pp. 120 and 121). Herzog, the agent of the Illinois Central road, says that he had at their docks at Southport at this same time, though they were much smaller and more easily guarded from fire,

> "probably 25 men, extra men, at night and perhaps one half of that number in the day time" and adds, "we had at one time as many as 14,000 bales, and at other times perhaps one-half" (p. 112).

The Fire.

The only direct testimony about the fire is that of Robeau, one of the defendant's employees, an "officer" of Boylan's detective force, who was called by the plaintiffs. His evidence is at pp. 151 to 162, and is in substance as follows:

At about half-past six in the evening of November 12, Valle, whose regular beat was between the sheds (p. 155), was for some unknown reason in shed No. 2. At that time Robeau, a large and very stout man (p. 164), the only Boylan watchman in shed No. 2, was standing at the lower end of shed No. 2, near the river side, when he heard some one cry fire. He ran to the woods side of the shed, a

distance of about 200 feet; not seeing anybody he ran back again to the river side; he then ran to the upper end of the shed, a distance of about 300 feet, still not seeing any fire. He then ran through the shed again in one of the gangways to the woods side, and then some distance from him he saw Valle in the centre of the shed, standing on a pile of cotton with the hose in his hand. Valle shouted to him to go and open the valve. He pushed in as best he might, between the piles of cotton, and reaching the valve of the hydrant, found that it was open (p. 154), and that the water had swelled the hose out for a little way, *but how far he did not notice* (p. 158), and found the water pouring, that is, leaking (p. 154).

He then climbed up by Valle but did not see the fire till he got up on the cotton to where Valle stood, and when he first saw it it covered only three or four bales of cotton (p. 155) near the floor of the dock (p. 160). For a short time, which he estimates as a few seconds, but the length of which no one can tell, he assisted Valle in attempting to pull up the hose (p. 159), which was on a platform about six feet from the floor (p. 154), the cotton on which Valle and Robean stood being piled about fifteen feet above the floor (p. 162). *They both pulled at this hose, but it was tangled so that both men together could not pull it out* (pp. 157, 158 and 161). NO WATER COULD BE GOTTEN THROUGH IT, and, after standing there and pulling at it for a short time, the fire meanwhile spreading, both of them, knowing the inflammable nature of cotton, ran to save their lives (p. 153). The other Boylan "officer," who was stationed in shed No. 1, did not even appear on the scene.

COURSE OF BUSINESS.

The general course of business between the defendant and the various steamship lines centering in New Orleans is stated in the Clayton case (173 U. S., p. 348), but for the purposes of this case

a number of additional facts were put in evidence, as bearing upon the questions of deviation raised on this appeal, a determination of which questions in favor of the appellants herein would finally determine the thirty other cases growing out of this fire which are still pending in the Second Circuit.

AS TO THE ARRANGEMENTS MADE BY THE DEFENDANT WITH THE STEAMSHIP COMPANIES, UNDER WHICH ALONE STEAMSHIPS WOULD BE SENT TO WESTWEGO TO RECEIVE COTTON.

Prior to the erection of this dock all cotton coming over the defendant's line was delivered at the city front in New Orleans, on the New Orleans side of the river, the Railway Company trucking it to the ship's side (Le Blanc, p. 48; Warriner, pp. 39 to 40, inclusive; Hammond, pp. 54 and 55; Ross, p. 62; Sanders, pp. 67 and 68; Miller, p. 31). To avoid the expense to the Railway Company of carrying this cotton eight miles further to Gouldsboro, ferrying it across the river and trucking it to the steamships, and for its sole convenience, this dock was built. It was first used for cotton in the fall of 1893, the cotton season beginning in September.

Each of the three contracts in this case is dated late in October 1894, and is for "delivery unrestricted" (pp. 176-177), which means that the railway company "was not bound to deliver the cotton at any particular date, nor was the steamer obliged to take delivery of the cotton at any particular date" (p. 109). In each case, however, such arrangement was agreed to by the steamship lines only upon the express condition that the defendant should have a certain number of bales on hand at Westwego ready to deliver before a steamer would be sent there to get it.

As to these arrangements Mr. Warriner, the agent of Elder, Dempster & Company (p. 38), the line

which was to carry the cotton in suit (p. 170), testified as follows:

> In November, 1894, "we had a number of contracts to carry cotton from New Orleans to foreign ports, where *we had agreed to take it at Westwego if a sufficient quantity was there.* The arrangement as to a sufficient quantity was that we wouldn't send a ship for less than *two thousand* bales or so, so as to keep us working at least a whole day.
>
> Q. Was any time specified or understood between you and the Texas and Pacific Railway Company, at which you should go to Westwego to receive cotton after it arrived there?
>
> A. No; the delivery on both sides was unrestricted.
>
> * * * * *
>
> Q. Then do you mean to say, Mr. Warriner, that in the season of 1893–1894, you would not send your vessel to Westwego for less than two thousand bales?
>
> A. *That was our practice then. And prior to the erection of this wharf we did not send our vessels there at all*" (pp. 40 and 41).

Mr. Le Blanc, the agent of the Harrison line (p. 47), testified as follows:

> "The minimum amount of cotton that our vessels would go to Westwego for at that time [1894] was a thousand to fifteen hundred bales.
>
> Q. Then, as I understand you, none of your steamers would go there to take any amount of cotton less than 1,000 bales?
>
> A. No; we wouldn't agree to do it in advance.
>
> Q. According to the custom in New Orleans at that time, if you had an arrangement to take, say, less than 500 bales of cotton coming from the Texas and Pacific Railway Company, where would that delivery have been made?
>
> A. Probably at our wharf.
>
> Q. That is on the New Orleans side of the river?
>
> A. Yes, sir (p. 49).

Mr. Hammond, another steamship agent (p. 54) testified as follows:

> "It was always understood we should not go there for less than one thousand bales * * *. I mean that in the season of 1893–1894 I would not send my vessels to Westwego for less than 1,000 bales unless it suited me, unless it suited my own convenience. But prior to the erection of these docks I did not send my vessels there at all. * * * It was always tacitly understood that I would not go for less than a thousand bales, and *they never demanded that I should go there* (p. 56).
>
> In 1893 and 1894, if the Texas and Pacific Railway Co. had offered me for transportation on my vessels less than a thousand bales of cotton, by the custom of the port of New Orleans such cotton would have been received by me at the city front wharves (p. 56).
>
> Q. In those bills of lading, based upon shipments under arrangements such as you describe for a through rate, it was customary, was it not, to describe the point at which the railroad would deliver the cotton as New Orleans; don't you know that? A. Always.
>
> Q. And that was supposed to be Westwego, was it not? In the case of the Texas and Pacific, between the steamship lines? A. Yes, sir, that is the way we understood it *for not less than a thousand bales.* After Westwego was built that was the understanding. * * *" (p. 59).
>
> Q. And the steamship company goes over there in order to get this cotton for export on its steamers?
>
> A. Oh, yes; they go there; that is *for a certain amount of cotton*" (p. 58).

Mr. Ross, a steamship agent of twenty-five years standing in New Orleans (p. 62), testified as follows:

> "The minimum amount for which I would go to Westwego, according to my recollection, was probably in the neighborhood of two thousand bales—something of that sort. * * * I don't think we ever had any

agreement or contract with the Texas and Pacific Railway to go to Westwego for less than two thousand bales. * * *

Q. In 1893-94 if the Texas and Pacific had offered you for transportation on a vessel of your line, less than two thousand bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. *Unless we had made an agreement to go to Westwego, they would have had to deliver it at our regular wharves*" (p. 64).

"The railroad company would make a contract with the steamship agent, just exactly as any shipper would do, for the carriage of a certain amount of cotton on the terms specified in that contract; that was the special arrangement I refer to. *A part of that special arrangement would be that I would go to take such freight at Westwego.*

Q. Don't you know that under those steamship contracts, when they would speak of a sea rate, we would say of 49 cents a hundred pounds, from New Orleans to Liverpool, that it was the general custom, without specifically mentioning Westwego in the contract, for the steamship to receive that cotton at Westwego?

A. Most positively no.

Q. You don't know?

A. Most positively not.

Q. *You say in your case Westwego was always named as the place of delivery, if it was the place of delivery?*

A. I say *when we went to Westwego, we did so under a special arrangement to do so and not otherwise.*

Q. *Then, if no place was named in the contract fixing the sea rate, Westwego would not be the point of delivery, according to your understanding?*

A. *Not without a special agreement; no, sir*" (pp. 65 and 66).

Mr. Sanders, the agent of the West India and Pacific Steamship Company (p. 67), testified as follows:

"Q. After the erection of this dock at Westwego, where was cotton delivered to you for

transportation by the Texas and Pacific Railroad?

A. At Westwego as a rule. * * *

Q. During the season of 1893-94 there was considerable cotton delivered to your line by the Texas and Pacific at your wharf?

A. That I can't say without referring to my books, but I presume there was, *the rule being that if they had over there at any time, say 2,000 bales, we would go to Westwego for it, and if they had a small quantity which they wished us to take, perhaps part of an accumulation, say less than two or three thousand bales, it would be delivered at our wharf* (p. 68).

Q. Before this wharf was constructed at Westwego, on that export cotton or through cotton, the place for delivery would be at a wharf on the city front in New Orleans?

A. As a rule; yes, sir.

Q. As a rule was it sometimes at the Texas and Pacific wharf in New Orleans?

A. I think on occasions it has been at the Texas and Pacific wharf on the New Orleans side.

Q. And at other times at a wharf of a particular steamship line?

A. Yes, sir.

Q. Now, after Westwego was opened, then cotton shipped in that way was shipped to Westwego and there received by the steamship lines, was it not?

A. As a rule, *with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery* (p. 70).

Q. And the point of delivery from the railway company to the steamship line under that class of bills of lading was always understood to be Westwego, was it not?

A. Yes sir; *under the modification I have expressed*" (p. 71).

Mr. Fornaris, the agent of the French line (p. 31), would not send to Westwego for less than 1,000 or 1,500 bales (p. 32).

See also the testimony of Alexander Harris, the agent of the Cromwell Line, to the effect that all cotton to be delivered to his line was carried to New Orleans and there delivered (pp. 33 *et seq.*).

THE EVIDENCE OF THE NEW ORLEANS MERCHANTS AS TO THE LIMITS OF THE PORT.

John G. Woods, a commission merchant at New Orleans for ten or eleven years, testified as follows:

> "Q. As a merchant, connected with the importing business here, would you say that in 1894 Westwego was considered, commercially speaking, within the port of New Orleans?
> A. No; I would not" (p. 35).

L. C. Fallon, a coffee and commission merchant in New Orleans for thirty-eight years, testified as follows:

> "Q. In November, 1894, did you consider Westwego as being commercially within the port of New Orleans?
> A. Well, really, I don't know whether Westwego is a part of the port of New Orleans to day. I never would accept delivery of a cargo of coffee there. If a shipper of coffee was to send me a cargo of coffee for delivery at New Orleans, and it was delivered at Westwego. I wouldn't consider it brought to the port of New Orleans. *I never knew of the delivery of any goods consigned to the port of New Orleans at Westwego*" (pp. 37 and 38).

George R. Westfeldt, a coffee merchant in New Orleans, testified as follows:

> "Q. In 1894 did you consider Westwego as commercially within the port of New Orleans?
> A. Not for coffee purposes" (p. 38).

From the correspondence between the Treasurer and General Manager of the defendant it clearly ap-

pears that the defendant was engaged at this time in delivering all cotton other than export cotton, at the City of New Orleans (see letters and telegrams, pp. 194 to 200), export cotton only being "detained" at Westwego.

Assignments of Error.

The following are the assignments of error relied upon by the plaintiffs in this Court (pp. 211-213):

First.—That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against the plaintiffs in error and in favor of the defendant in error, upon the trial of this cause.

Twelfth.—That the said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error upon the trial of said cause in refusing, at the conclusion of the testimony, to allow the plaintiffs in error to go to the jury on the question whether Westwego was, within the terms of the bill of lading, such a place within the port of New Orleans as the cotton could be taken to and unloaded by the defendant in error or was so well known by commercial custom of such long standing or so general or so universal as to be fairly within the constructive knowledge of the shippers.

Thirteenth.—That the said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error upon the trial of said cause in refusing, at the conclusion of the testimony, to allow the plaintiffs in error to go to the jury upon the question of the negligence of the defendant in error.

Fourteenth.—That the said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error upon the trial of this cause in directing, at the conclusion of the testimony, a verdict in favor of the defendant in error.

First Point.

The Circuit Court of Appeals erred in affirming the action of the Circuit Court in refusing to allow the plaintiffs to go to the jury on the question of negligence and in directing a verdict for the defendant.

After the plaintiffs had rested their case the defendant made a motion for the direction of a verdict *in its favor. This was denied* with leave to renew at the close of the whole case. The defendant then announced that it would offer no evidence and rested, and renewed its motion, and thereupon the trial court directed a verdict for the defendant and the plaintiffs excepted (p. 162).

WERE THE PLAINTIFFS ENTITLED TO GO TO THE JURY ON THE QUESTION OF NEGLIGENCE?

(*A.*) It is now familiar law that

> "In every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. * * *
> "If the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."
> *Pleasants* vs. *Fant*, *89 U. S.*, *116*.

Also,

> "That although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict so that one based thereon would be set aside, the Court is not bound to submit a case to the jury, but may direct them what verdict to render."
> *Herbert* vs. *Butler*, *97 U. S.*, *319* (*1877*).

(*B.*) But it is not in every case where a verdict *might* be set aside, that the Court will direct a verdict.

A very recent statement of what we concieve to be the law on this subject, has recently been given in the case of *Macdonald* vs. *Metropolitan Street Railway Company*, *167 N. Y., 66-69*, in which case it is said:

> "The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be set aside. It depends upon the discretion of the Court. The result of setting aside a verdict, and the result of directing one are widely different and should not be controlled by the same conditions or circumstances. In one case there is a retrial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.
>
> While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial Court may, whenever it sees fit, direct a verdict, and thus forever conclude the parties, has no basis in the law, which confides to juries and not to Courts the determination of the facts in this class of cases.
>
> We think it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the Court may properly direct a verdict. So long as a question of fact exists, it is for the jury and not for the Court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that as a matter of law no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the Court to determine it. But whenever a plain-

> tiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.
>
> The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law.
>
> If a court of review having power to examine the facts is dissatisfied with a verdict, because against the weight or preponderance of evidence, it may be set aside; but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and hence, as a matter of law, the party was not entitled to recover."

(*C.*) We are fully aware that we come to this Court appealing from the deliberate judgments of Judges distinguished for their learning and ability, and that this Court has recently said:

> "The Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for knowing all those matters in a trial not capable of record, and when, in his deliberate opinion, there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment, and if such judgment is approved by the proper Appellate Court, this Court, when called upon to review the proceedings of both Courts, will rightfully be

much influenced by their concurrent opinions."

Pythias Knights Supreme Lodge v. *Beck*, *181 U. S., 49 (1901).*

(*D.*) Notwithstanding these facts and the law last stated, we feel confident that we can conclusively show that both the trial Court and the Court of Appeals very clearly erred in their conclusions.

Were it necessary, we believe we could establish the proposition that there is no other legal conclusion to be properly drawn from the testimony herein, than that the direction of a verdict should have been in favor of the *plaintiffs* and not of the *defendant.*

(1.) The defendant gave no evidence.

In such a case, this Court has said in *Pleasants* vs. *Fant* (*supra*), (citing the case of *Paulding* vs. *U. S., 7 Cranch, 219*, a decision of Chief Justice Marshall),

> "A party so placed admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strictly against him, and such conclusions as a jury might justifiably draw the Court ought to draw."

(2.) Not only is the constitutional right of trial by jury zealously guarded by this Court, but it cannot be doubted that--

> "Where a cause fairly depends upon the effect or weight of testimony it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. *It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the Court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition thereto.*"
>
> *Phœnix Ins. Co.* v. *Doster*, 106 *U. S.*, 30, *at p.* 32.

The proposition is stated in *Texas Pacific Railway Co.* vs. *Cox*, *145 U. S., 593 (1892)*, (Mr. Chief Justice Fuller delivering the opinion of the Court), as follows:

> "The case should not have been withdrawn from the jury unless the conclusion followed as a matter of law that no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish."

(3.) Questions of negligence are peculiarly questions of fact for determination by a jury

This Court has said, in *Grand Trunk Railway* vs. *Ives*, *144 U. S., 408:*

> "*There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care, under any and all circumstances.* The terms 'ordinary care,' 'reasonable prudence' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. WHAT MAY BE DEEMED ORDINARY CARE IN ONE CASE, MAY, UNDER DIFFERENT SURROUNDINGS AND CIRCUMSTANCES, BE GROSS NEGLIGENCE *The policy of the law has relegated the determination of such questions to the jury under proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court.*"
>
> *Grand Trunk Railway* vs. *Ives*, 144 *U. S.*, 408, *at p.* 417.

In *Richmond & Danville Railroad Company* vs. *Powers, 149 U. S., 43* (Mr. Justice Brewer delivering the opinion of the Court), it is said:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury, and this is so whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed fair-minded men will honestly draw different conclusions from them."

In *Gardner* vs. *Michigan Central Railroad Co., 150 U. S., 349 (1893)*, this Court again said (speaking through Mr. Chief Justice Fuller):

> "The question of negligence is one of law for the Court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

The determination of a question of negligence is for the jury when a given state of facts is such that reasonable men may fairly differ upon the question.

Baltimore & Ohio R. R. vs. *Griffith, 159 U. S., 603.*

Warner vs. *Baltimore & Ohio R. R. Co., 168 U. S., 339.*

Patton vs. *Texas & Pacific Railway Company, 179 U. S., 658, 660 (1901).*

(4.) Where the premises are in the exclusive possession and control of the defendant and the facts are peculiarly within its knowledge, very slight evidence of negligence is sufficient to make out a prima facie case.

Indeed, the court at Circuit clearly recognized this rule theoretically, for it said,

> "The burden of proof is upon the plaintiff. But, of course, it is to be taken into consideration that his testimony has to be sought from employees and from persons connected in one way or other with the defendant, in part at least, and that while the burden remains upon him, slight testimony may be sufficient—should properly be sufficient—to send the case to the jury for the drawing of proper inferences from the facts proved" (p. 162).

The New York Court of Appeals has said, all concurring, with reference to the loss of a quantity of cutlery, an article not at all inflammable, but destroyed by fire upon a defendant's wharf, in a case where the origin of the fire was not disclosed,

> "We think that enough was shown to call upon the defendant to explain the circumstances attending the destruction of the property; and that, in the absence of any such explanation, the jury would have been authorized to infer that proper precautions for its safety had not been taken. Whether due caution required that the wharf should be furnished with the means of extinguishing fire, or that a watchman should be kept there during the night, were questions for the jury, dependent upon the circumstances of danger which may have surrounded the premises. The plaintiff's evidence of the absence of the means of extinguishing fire was not of the most satisfactory character; but the defendant, although possessing the best means of proof upon the subject, did not controvert it; while the fact of the fire originating on the defendant's premises, in connection with the failure of the defendant to offer any explanation of its origin, or even to produce any of the persons said to have been left in charge, or to show that they performed their duty, or that any effort was made to take the goods out of the reach of the fire, were circumstances from which the jury might have drawn inferences unfavorable to the defend-

ant on the question of negligence. The nature of an accident may itself afford *prima facie* proof of negligence (Curtis *v.* Roch. and Syra. R. R. Co., 18 N. Y., 534, 544; Story on Bailments, Sec. 338; 5 Exch., 787; 3 Hurlst. & Colt., 596; 13 Peters, 181; 5 Ad. & El. 747; 11 Pick., 106; 2 Camp., 79) and we think, as the case stood, the judge erred in not submitting the question of negligence to the jury. These views do not conflict with the case of Lamb *v.* The Camden and Amboy R. R Co (46 N. Y., 271), cited on the part of the respondent; although the burden of proof of negligence in such cases unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted."

Russel Mfg. Co. v. *N. H. Steamboat Co., 50 N. Y., 126, 127.*

(5.) The isolated position of Westwego, its absolute lack of external facilities for extinguishing fire, its lack of police protection, have been already commented upon.

By reason of the peculiar contracts above stated, concerning delivery at Westwego, and under which the Steamship Companies would not go there for less than 2,000 bales, an immense accumulation of cotton occurred. The Steamship Companies were under no obligation to take delivery at any special or reasonable time, and the delay in the arrival of vessels at New Orleans placed the Steamship Companies under no legal liability to the defendant.

(6.) The defendant's officials were very much disturbed in relation to this accumulation of cotton at Westwego. Satterlee, the secretary and treasurer of the company, writes to Thorne, the third vice-president and general manager, under date of October 15, 1894, two weeks before this cotton was *shipped in Texas:*

> "Noting the very heavy movement of cotton during the last week or since October 1st, please let me know the condition at New Orleans, and if it is forcing much accumulation at that point, particularly on our export cotton wharf. I feel very anxious on the subject, *fearing an accumulation that may expose us to great risk*" (pp. 195, 196).

On October 20th Thorne writes to Satterlee:

> "I am very much surprised on my return to the office, after a few days' trip over the Eastern Division, to find, on checking the reports, that the cotton on hand at New Orleans has doubled up on us in the last five or six days. We have on hand, at the last report, at New Orleans and Westwego, 48,000 bales of cotton, and I have taken the matter up vigorously and am in hopes that we can force the delivery" (p. 197).

On November 6th he telegraphs:

> "The labor trouble and delay in loading vessels at New Orleans the past few days has increased. The amount of cotton on hand undelivered our report this morning shows about 26,000 bales of cotton at Westwego, and the same amount at New Orleans, with but poor prospects for deliveries to-day or to-morrow or until afterthe election" (p. 197).

(7.) The situation grew worse after November 6th, for on November 12th, the date of the fire, there were on the dock and in cars at Westwego over 28,000 bales of cotton.

(8.) Notwithstanding this accumulation of cotton, the defendant received this cotton at Greenville, Texas, intending to take it to Westwego. The bill of lading is dated October 29th (p. 174).

It may well be asked whether it was not negligence for the carrier to thus carry this cotton to Westwego, in view of the accumulations there of such an unprecedented amount of cotton, worth over a million dollars. The cotton involved in this suit was, as we have said, not even unloaded from the cars by the 12th of November, though it arrived on the 7th. It is not possible, we submit, to hold, as matter of law, that taking these cotton laden cars to this dock, already overcrowded with cotton and cars loaded with cotton, was not negligence.

In *Thomas* vs *Wabash, St. Louis and Pacific Railroad Co., 63 Fed. Rep., 302*, it is said:

> "It is sufficient to say * * * that the carrier was bound to know when he accepted the cotton that he had or could avail himself of facilities to transport it within a fairly reasonable period. It is unnecessary to cite authorities in support of the position that a carrier is not bound to receive freight where he has no facilities for transporting it, or when his line is already overtaxed and congested by freight previously accepted for transportation. The C. & C. L. R. Co. was under no obligation to receive freight at Memphis when it had no ability to transport it to the destined point within a reasonable time. It chose to do so, however, and cannot be relieved from its undertaking because of difficulties in the way of the performance of the contract when its agent knew of such difficulties at the time the contract was executed."
>
> "It is not mere delay therefore but negligent delay in a dangerous place—willful it may be said—and deliberate exposure of the cotton to danger from fire that fixes the liability of the carrier. The danger could have been foreseen and guarded against."

In *Thomas* vs. *Lancaster 71 Fed. Rep. 485* (Circuit Court of Appeals for the Seventh Circuit, Jenkins, *J.*, writing the opinion), it is said:

> "The COTTON, as is well known, IS A HIGHLY INFLAMMABLE MATERIAL. * * * THE RAILROAD COMPANY WAS BOUND TO DEAL WITH THIS PROPERTY WITH A CARE PROPORTIONATE TO THE RISK. Being inflammable the cargo should be zealously guarded against exposure to fire."
>
> "The exemptions from loss by fire contemplate a continuous carriage according to the usual course of business, and the danger incident to such carriage. * * * It certainly did not contemplate that the carrier, during such suspended transportation, might negligently expose the cotton to dangers that ordinary forecast should have guarded against. In case of delay by the carrier he is bound to protect the property in his charge from unreasonable hazards. He is bound to guard it from dangers which ought reasonably to be apprehended. If he fail therein, and especially if he unnecessarily exposes the property to apprehended danger, he is liable notwithstanding the exemption of the bill of lading, and although his act may not be the immedate cause, but the concurring cause of the loss."

(9.) New Orleans was at this time in the midst of very serious labor riots. The terminals of two railroads, with a large amount of cotton in each, had very recently been destroyed by fire. Was it or was it not negligence, or was it or was it not an additional fact which the jury might have properly considered in determining a question of negligence, that with this vast accumulation of cotton on an isolated and unprotected dock, in a time of great apprehension on account of labor troubles which had already caused the destruction of the terminals of two railroads, this defendant, instead of increasing its force of watchmen as the cotton increased in amount, *decreased* its force of watchmen as the cotton *increased* in amount?

(10.) This defendant cannot pretend that it did not have notice of the increased danger of fire. As late as October 23, 1894, a fire had occurred upon this dock, the report as to which is as follows:

> "Officer Campbell, who is on duty at Westwego for account of the T & P. R. R. in No. 1 shed, reports that at 4.15 P. M. two bales of cotton in shed No. 1 were discovered to be on fire by Thomas Roach and John Casey, two longshoremen who were working there loading the British steamship *British Crown*. Officer Campbell * * * and Mr. Wilkinson, superintendent of the T. & P. R. R., and some longshoremen extinguished the fire. About twelve bales had to be removed from off that burning bale before they could throw water on them. * * * No person had been working near the cotton that caught fire for about a week. It had evidently been burning about half an hour before it was discovered, but no smell of fire was detected. They were at the bottom of the tier of 100 bales and got on fire near the buckle. * * * Mr. Wilkinson * * * is disliked by the colored laborers employed there on account of the way in which he swears at them whenever he tells them to do anything. On Sunday, October 31, 1894, while he was waiting for a car at the corner of one of the T. & P. piers, he asked a negro why he did not go to work that day, and he said he would not go with that man, Mr. Wilkinson, as he had no use for a negro and wanted him to work twelve hours for ten. The officer thinks that some person having a grudge against Mr. Wilkinson must have tried to set the cotton on fire" (pp. 150, 151).

Not only, then, were there these labor troubles in New Orleans to require additional precautions, but as affecting particularly the Texas and Pacific Railway Company, there was notice to it that the negro laborers were so inimical to its Superintendent Wilkinson that the fire of October 23d was concluded to be the result of incendiarism.

(11.) Wilkinson, the chief clerk on the dock, had also charge of the fire apparatus (p. 21), and was a very careless and unfit man, but still retained in the employment of the defendant. He was reckless enough to shoot among the cotton at a dog, on which subject a report was made. That occurrence took place on the 9th of November.

> "Officer Peake, who was on night duty at Westwego, states that last Friday night Mr. Wilkinson, the chief clerk, fired at a dog. This occurred just outside the office, and in the line of his fire were two rows of cotton" (p. 151).

Wilkinson was often drunk during business hours, as testified by Coffey (p. 75), Lecorgne (p. 80) and Trainor (p. 84).

(12.) In this vast mass of cotton the defendant continued its course of pulling in and hauling out cars on the railroad track between the shed and the river, and on the railroad tracks on the woods-side of the sheds.

This was being done on the day of the fire, as shown above, and on this day the locomotive was actually within a few feet of the place where the fire broke out, and the cotton was so close to the west rail of this track near the river that a man could not safely stand between the track and the cotton (pp. 100, 101).

It is submitted, therefore, that here there was a situation calling for the utmost watchfulness and for increased precautions commensurate with the greatly increased danger. A vast and unprecedented accumulation of cotton which was worth over a million dollars; this cotton not headed as was custom[illegible] on other docks, but piled, and piled nearly to the roof of the sheds; the whole space so full that no more cotton could be unloaded; the bales jammed together; no gangways running lengthwise of the sheds; the few cross gangways running from the river to the woods very narrow, and impeded with cotton headed up

and cotton piled on that, so that there was hardly room for a truck to pass through with a bale of cotton lengthwise of the truck; the whole city excited by labor riots; a drunken superintendent who was quarrelling with the negroes and shooting at dogs amid the cotton; a locomotive engaged in going up and down in very close proximity to the cotton; an extremely dry season, no rain having fallen for weeks; an east wind blowing so that any sparks from the locomotives which traveled up and down the track between the river and the sheds would be blown directly into the sheds; the cotton piled so close to the west rail of the track that there was no room for a man to stand between the cotton and such track when the locomotive went by,—can we not justly say that these facts alone, a fire having occurred and destroyed the cotton, are such that they should have been presented to the jury to draw such inferences as they saw fit either for or against the defendant, without any proof whatever on the subject of the character or condition of the fire apparatus?

But when to this situation there is added the fact that this large area, containing this enormous value, was in the charge of only *three* men, no one of whom is shown to have had any experience whatever in handling fire apparatus or extinguishing fires, being mere *watchmen* and not skilled *firemen*, the one in authority being nineteen or twenty years of age, may we not say that it was quite within the realm of possibility that some reasonable man should believe, and by his verdict say, that no prudent owner would so leave his own goods? Clearly it was not the province of any *Court* to draw, as the courts below have done, the inference of *fact* that three watchmen constituted a sufficient number of firemen to guard against and extinguish fires in this mass of inflammable material.

And when to all these facts the still further facts are added, that on the breaking out of a fire, which by the uncontradicted testimony could have been extin-

guished if the fire apparatus had worked to its capacity, only two of these "*watchmen*" appeared on the scene; that these two could not make the apparatus work, and that it did not work at all, we say, without fear of contradiction, that the books can be searched in vain for any case bearing any legal resemblance to this, where the question of negligence was taken away from the determination of a jury.

(*E.*) Let us now examine the opinion of the Circuit Judge (pp. 162 to 165).

We respectfully submit that that Court not only drew a large number of inferences of fact all of which properly belong to the province of the jury only, but that some of the most important of those inferences are not in any respect warranted by the testimony.

1. The learned Judge at Circuit says:

> "For instance, it may very well be argued that the circumstance of a locomotive being allowed to run upon the track among this cotton by the end of the wharf might perhaps be sufficient to send the case to the jury, under ordinary circumstances, to determine whether that was negligence, in view of the peculiarities of cotton and its liability to become ignited, if there were anything to show that this fire was at all connected with the movement of that engine. *But it appears that the engine was at one end of the dock and this fire was in the middle of the shed.*"

In this statement the Circuit Court was clearly in error.

On the day of the fire in question the steamship *Malabar* was lying opposite Shed No. 1, loading with cottonseed meal and cottonseed cake, and on the same day the steamship *Elberfeld* was lying opposite Shed No. 2, loading with the same kind of goods; these goods were not taken from under the sheds,

but from cars on the track east of the sheds, and as the cars were emptied full cars were brought in (see testimony of Ellis, Nie, Stytch, John Reinhardt, William Reinhardt, Lincoln and Kent, who all worked at loading the *Malabar*).

Eilis says:

> "The locomotive was on the track beside the *Malabar* about 12 o'clock" (86-87); he had seen a locomotive there a number of times before. "The engine came in about half an hour before that; she came in, got the cars, and pushed them up and then went off again" (pp. 86 and 87).

Nie says that he saw a locomotive on the track at about 12 o'clock; how far up she went he did not know, but she passed the hatch where he was working; he saw the engine on the wharf before; saw it there other times; they came to pull cars in and they often came in there (89).

After the engine came up he went off to dinner and left her there. "JUST PREVIOUS TO DINNER TIME SHE CAME UP ON THE WHARF, STOPPED AT HATCH NUMBER 3, AND WENT UP THE WHARF FURTHER; * * * WHEN I WENT TO DINNER SHE WAS PUFFING SOMEWHERE UP ON THE WHARF; *she was moving up there*" (92).

The wind was from the east and north east during the day (p. 120).

If the learned Court had recollected this testimony, can it be that in view of its own remarks above quoted, it could have failed to send the case to the jury?

In addition to this, the Court wholly ignored the evidence, that after half past five in the evening and shortly before this fire, it was the general practice to haul out the empty cars on this track and bring in the loaded cars (p. 74).

In regard to fires from locomotives, Wharton says:

> "A slight inference of negligence however, raised by the plaintiff's case, is sufficient

> to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive affirmatory evidence. In cases of this class, from the nature of things, it is not necessary for the plaintiff to do more than to show such circumstances as lead to the inference of negligence. There may be no direct proof of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained, and when this is so the defendant must disprove negligence by showing that he exercise due care.
>
> *Wharton on Negligence, Sec. 371.*

This rule is particularly clear where the defendant brings its locomotives into close proximity with inflammable material. Indeed, it is negligence to do so.

Hoffman v. *King, 160 N. Y., 618.*

See also

Sect. 678, Shear & Bedf. on Negligence,
and
Eddy v. *Lafayette, 49 Fed. Rep., 807.*

(2.) Again, the learned Court suggests that the plaintiffs have not established that the fire was the result of arson. They have made no such claim.

The fact that only a few days before this cotton was destroyed, a fire of incendiary origin was discovered and extinguished, might, we ventured to presume, cast upon the defendant the duty of increasing its force of watchmen rather than decreasing it; but we contended that at least, the plaintiffs were entitled to go to the jury on the additional proposition whether, under the circumstances of this case, reasonable care had been taken of this property in *de*creasing the force of watchmen as the danger *in*creased.

We might well claim that the undisputed facts of a locomotive moving and puffing in near proximity to this cotton, with the wind blowing from this track toward the cotton, and of the failure of the

fire apparatus to work in the hands of those chosen by the defendant to manage it, were sufficient to raise the presumption of negligence, and, the defendant offering no testimony, that the plaintiffs were entitled to the direction of a verdict.

The proper tribunal, however, before which to establish the fact of negligence is, of course, a jury, and to secure a reversal of this judgment the plaintiffs need only show that the facts were such that reasonable men might have drawn different inferences therefrom, and that if the jury had found that the facts indicated negligence, their verdict would not be set aside as against the evidence.

We beg, however, to submit that we know of no such harsh rule of law as would compel a plaintiff to show conclusively what was the origin of the fire on defendant's premises.

Even conceding, for the purposes of the argument, that if the defendant had called its employees as witnesses, such persons could not have shown what the origin of the fire was, this would not have necessarily relieved the defendant. No one might be able to say that he saw a spark carried to the cotton from the locomotive, either while it was, on the day of the fire, puffing somewhere up on the wharf, while it pulled in or hauled out the empty or full cars during the day or at the close of the day's work; no one might be able to say that he saw some negro, whom the drunken superintendent, Wilkinson, was accustomed to curse, set fire to the cotton, or that he saw one of the three distinguished "officers" whom Boylan picked up around New Orleans to watch the cotton, or one of the workmen leaving for the night, carelessly light his pipe among the cotton. How does this relieve the defendant?

The gist of this case is not only a possible negligence in the origin of the fire, but the clearly established negligence of having such an immense accumulation of cotton with such an absurdly inadequate force to help extinguish fire, and such a fire ap-

paratus, that when the fire broke out it would not work.

The destruction of the cotton is what is complained of, not alone the origin of the fire.

(3.) The Circuit Judge says that

> "The evidence here shows that the fire was most promptly discovered,"

and he apparently bases this conclusion upon the fact that

> "undoubtedly at the time Valle gave his alarm of fire there was very much less than the quantity of fire that there was there when Robeau got there."

But how does this show that the fire was most promptly discovered? Valle is not called to show what the condition of the fire was when he first saw it. As it was in the middle of the shed where Valle had no busmess to be, it is probable that it was discovered by him by the light of the fire. But no testimony was given from which the jury could say how long this fire had been smouldering or smoking.

We submit that the jury would have been fully warranted in finding that this fire started long before it was discovered. It would appear to be probable that before discovery this fire had gained greater headway than the fire of October 24th, and the official report of the defendant admits that that fire was not only not discovered by its own watchmen, but had been burning *for about half an hour* before discovery by two of the many longshoremen working there at the time, although it occured in broad daylight (p. 150).

(4.) Again, the conclusion of the trial Judge, not mentioned in the opinion of the Court of Appeals, is that because this fire was *discovered* promptly there was not sufficient evidence to submit to the jury the question of whether the number of watchmen was

properly proportioned to the amount of territory and merchandise they had to watch.

At the time of the breaking out of this fire Robeau was standing on the river side of the dock about 30 feet under the shed at the lower end, towards No. 1 shed. Upon hearing the cry of fire he ran through a gangway to the woods side of the shed, a distance of over 200 feet, to see if he could see anybody, but not seeing any one he ran back again to the river side, 250 feet more. He then ran to the upper end of his beat (p. 157), a distance of 300 feet, and then through to the woods again (p. 158), another 250 feet. He then saw Valle on a pile of cotton at about the centre of the shed and 70 or 75 feet down from the upper end of the shed (pp. 158 and 154). Robeau then went to help him, passing down 70 or 75 feet and in toward the centre of the shed, over 100 feet, making, at the lowest estimate, a total of over eleven hundred feet, *nearly a quarter of a mile, that Robeau actually ran* in his efforts to find the fire and before he reached the point at which it had broken out, and yet when Robeau got there, after running all around the dock to find the fire, and had climbed upon top of the cotton, after going to the valve, the fire could easily have been extinguished if only the means provided by the defendant for use in such an emergency, had worked.

When Robeau got near to Valle, Valle shouted to him to go down and turn on the valve and Robeau went. As he says: "I could only go sideways; I couldn't hardly stand, and I found the valve open. I then came back and tried to help Valle with the hose" (p. 153). They couldn't do anything with the hose and Valle told Robeau to "go down and untangle the hose," but Robeau wouldn't go because of the fire, and soon afterwards, just how long no one can estimate with any degree of accuracy, they had to run (p. 153).

That was the situation, as proven in so many words by the testimony. Surely, then, it would not have been an unreasonable inference for the jury to

draw, that if Robeau or some other watchman had reached the scene quicker he would have had time and opportunity to untangle the hose.

This defendant must be held chargeable with the knowledge that if fire once broke out in this vast mass of nearly 28,000 bales, only prompt action by an efficient force could save the whole accumulation from destruction, yet this statement of the learned Court deals solely with the question of the prompt *discovery* of the fire.

We had hitherto supposed that a much more important question was its prompt *extinguishment*. The Court fails absolutely to take into consideration the main contention of the plaintiffs, namely, that the number of watchmen employed was insufficient in case a fire was discovered, to *put it out*. Clearly the plaintiffs had the right to insist that the *jury* should have the opportunity to draw the conclusion that if more watchmen had been employed on this dock, some of them would have discovered the fire even sooner, and would have been near enough to have responded more quickly to an alarm of fire, and by reason of their proximity to the fire, would have had time enough to reach the fire when it was still less than it was when Robeau got there, and thus have had time to smother it, or to prevent the hose from becoming tangled, or to untangle the hose, and been enabled, if water had come, to put out the fire, for, as Robeau says, even after he got there, IF THEY COULD HAVE GOTTEN WATER THROUGH THE HOSE THEY COULD HAVE EASILY PUT OUT THE FIRE (p. 155).

And if a jury had found that this defendant was negligent in not having more men, not only to discover this fire, but to *put it out*, the evidence would have been sufficient to support such verdict.

(5.) Again, the learned Judge says:

> "There is no suggestion here in the testimony that the piling up of the cotton interfered in any way with the access to the hydrant to turn the water on."

But, the Court evidently altogether forgot the evidence that sometimes cotton would fall over and block the hose (p. 85), and ignored the important and undisputed testimony that there were no alleyways at all running parallel with these long sheds, and that the cotton was piled so high as to shut out all reasonable opportunity to see any fire until it had gained headway, and that the piles of cotton offered the gravest obstruction to the free use of the hose after the discovery of the fire. A man unincumbered could only wedge himself in sideways through a narrow gangway to a hydrant, but it was a very much more difficult matter after encumbering himself with hose 100 feet long, to attempt to stretch it over piles of cotton reaching well-nigh to the roof.

(6.) The Circuit Court concludes:

> "There remains only the *additional circumstance*, which is in testimony from Robeau, that the valve having been turned on, the water did not come out of the nozzle of the hose; and the explanation which he himself gives is that the hose was kinked and tangled so the water would not flow through from the valve to the nozzle.
>
> There is nothing upon which we can infer that there was anything the matter with the tank or the supply of water, or the valve or the hose itself, or even with the place where the hose was put; and there is nothing in the testimony here to show that to stack up the hose the way it was stacked, folding it back and forth on the platform, was negligence on the part of the persons so stowing the hose. There is no evidence to show that it was. For aught that appears here that was a perfectly proper mode of stowing it. *As far as we can infer* what may have produced the failure of the water to go through the hose, it is apparent that the hose was thrown down, either intentionally by Valle to get at it better or accidentally in scrambling up to his position on the cotton—was thrown down in a pile on the platform, whereupon, instead of kicking

> the kinks or pulling the kinks out of the coils of hose that he had there so as to give an opportunity for an unobstructed flow of water, he turned the water on first and then undertook to pull the kinks out afterwards, expecting the water to force its way through. I do not think that single circumstance, *assuming that that was the way it came about*, is sufficient to hold the company to the responsibility of negligence" (fol. 240).

It is submitted that nearly every sentence in this portion of this opinion is wholly unwarranted, and entirely unsupported by the evidence.

(*a.*) Robeau does not use the word "*kink*," a word which the skillful counsel for the defendant sought to put in his mouth, endeavoring to convey the impression that the pressure of water was so great that the hose was kinked thereby. The testimony on this point is as follows:

"CROSS-EXAMINATION:

> Q. What did you do when you went there? [*i. e.* down on the floor of the dock to open the hydrant valve.]
>
> A. I went there and I saw the valve was wide open.
>
> Q. The what?
>
> Q. The valve of the pipe.
>
> Q. And was there water in the hose?
>
> A. Kind of water; yes, in the hose.
>
> Q. It had pushed out in the hose, had it?
>
> A. Yes, swelled up.
>
> Q. *How far had it pushed out and swelled up in the hose?*
>
> A. *I didn't look. As soon as I saw it open I went to Valle to help him.*
>
> Q. What did you do to help him?
>
> A. We tried to pull the hose free and we couldn't do anything.
>
> Q. The pressure of water had KINKED the hose?
>
> A. Yes, the hose was so TANGLED that we couldn't do anything (p. 158).

REDIRECT:

Q. Mr. Taggart has asked you if the pressure of water in the hose made it so heavy you could not pull it out?

A. I couldn't pull it, and I know I am a strong man.

Q. Listen to my question. When you were pulling on the hose with Valle, *why didn't it come up? What was the matter with it?*

A. *It was so badly tangled.*

Q. Was there any water in it down on the platforra?

A. Yes; down on the platform. You mean the plank?

Q. At the plank?

A. Yes.

Q. But when you got up and were pulling with Valle, *was the hose* that was below you —5 or 6 feet below, *where it was tangled up*— was it *full of water?*

A. *I didn't look at that*" (Robeau, pp. 161 and 162.

(*b.*) Robeau nowhere says that the hose was so kinked that the water would not flow through it. He says the hose on the platform where it was kept was tangled so that Valle and he could not pull it free. As to what tangled it, who tangled it, how or when it was tangled, where it was tangled, or whether it was tangled when Valle got there, there is no word of proof. As far as the evidence shows it was not tangled by any pressure of water.

On the contrary, Robeau said he did not notice how far the water swelled out the hose at the valve, and did not look to see whether the hose on the platform was full of water (pp. 161, 162).

As we have shown, there is not one syllable of evidence in this case that this hose had become heavy and cumbrous because of any water in it. It was heavy in itself for one man to carry over piles of cotton. If tangled, it may have been because blocked by the bales of cotton that had fallen upon it or from careless coiling.

We are absolutely in the dark as to what tangled

the hose. There is not a shred of testimony to show that either the pressure of water or that Valle tangled it. We do not even know what Valle did in relation to the hose, except that he got the nozzle a few feet above the rest of the hose on the platform.

Very evidently he did not *believe*, when he was tugging at the tangled hose, that such tangle was a "*kink*," or that the hose was heavy with water; he doubtless believed that there was no water in the hose, for he called to Robeau to go down and open the valve.

Valle apparently had not opened the valve. There is no evidence that he had, and unless we come to the conclusion that he had wholly lost his head, we must find that he had not opened the valve, as he shouted to Robeau to go and open it. Robeau went down to the valve and there found it open, but also then found the water, the only water we have in the whole testimony, leaking.

> "Q. You did not see any water when you were opening the valve?
> "A. Yes, I saw the pouring.
> "Q. Leaking, you mean?
> "A. Yes."

This means, the jury might well say, that the hose was not screwed on to the pipe tight enough, or that the hose was ripped, and thus the water allowed to leak—pour out.

Again, the place where Robeau and Valle stood was only a very few feet above the hose on the platform, and the length of hose which was free could not have been at the utmost more than ten feet. It surely cannot be claimed that the pressure of water was so great that it filled the hose for ninety feet, and there "*kinked*" it. This attempt to show that there was a pressure of water in the hose which "*kinked*" it, is wholly unsupported by the evidence.

(*c*.) The hose was tangled, as the witness says. It was not kept in the ordinary way, stretched out

or rolled on reels, and cotton sometimes fell over and blocked it. It was for the jury to say whether keeping the hose folded in this unusual way and so surrounded with cotton that it could become tangled and unfit for use in the moment of peril was, negligence.

(*d.*) Not a single syllable of testimony supports the extraordinary inference of the Court, that "it is apparent that the hose was thrown down, either intentionally by Valle to get at it better, or accidentally in scrambling up to his position on the cotton." Were this true, what an astounding proposition it would be to say that a jury could not find that if the hose was kept in such a condition as to be tangled and rendered useless by such a method of handling, it was not negligence.

(*e.*) But the Court further says that after the hose was thrown down in a pile on the platform, Valle

> "instead of kicking the kinks or pulling the kinks out of the coils of hose that he had there, so as to give an opportunity for an unobstructed flow of water, he turned the water on first and then undertook to pull the kinks out afterwards, expecting the water to force its way through."

The picture that the Court draws is wholly unsupported by the evidence. As we have shown, there is no syllable of evidence which would justify a Court or jury in finding that there were any kinks in this hose at all.

Valle is made by the Court, not by the testimony, to throw the hose down in a pile on the platform, either intentionally or accidentally in scrambling up to his position on the cotton, and it is said by *the Court* that he should then have kicked or pulled the kinks out, but instead of doing that he turned the water on first. Evidently then, in the mind of the Court, these mythical kinks were in the hose before the water was turned on.

Then Valle must have gone to the hose first, thrown it down and got kinks in it, then have gone to the valve and turned the water on, and then come back to the hose and pulled at it to get the kinks out.

If the defendant had left longitudinal gangways in the line of the hydrants, as we insist the jury had a right to infer it was negligence not to do, Valle would not have been on top of the bales of cotton at all, but would have been stretching that hose in such longitudinal gangway, or pulling it *down* to the floor of the dock from the platform on which it was coiled, instead of trying to pull it *up* from the platform and carry it over the tiers of cotton to the place of the fire.

(*f.*) No water would come through the hose. One would suppose that the natural, primary inference to be drawn from this fact, was either that the pressure of water (concerning which there was *no* evidence), was insufficient, or that the fire apparatus was in some other respect out of order. There is no syllable of proof here to show that if Valle had had a clear line of hose, leading directly from the hydrant to the fire, any water would have come out of it. As it was, to reach the fire, the hose had to be carried up over high piles of cotton, and then across such piles of cotton; whether any water would have run out of the nozzle under such conditions, even if not tangled, does not appear.

In any event, we submit that it is not the law that when apparatus exclusively managed and controlled by the defendant, designed especially to extinguish fire, is found to be in such a condition that it will not work in the hands of those employed by defendant to work it, the *Court* can say that there is nothing in such fact which would justify a jury in inferring negligence.

(*F.*) Turning now to a consideration of the opinion of the Court of Appeals (pp. 207 to 210), it appears that that Court wholly ignored the contentions of the plaintiffs that they had the right to go to the jury on the questions whether the proper number of watchmen had been employed to guard against, or extinguish fire in one million dollars' worth of property; whether if on a cry of fire by Valle, the defendant should not have had more than one "large and very stout man" to come to his assistance; whether the defendant might not have gone to the length of having barrels full of water near the hydrants, with buckets handy, or perhaps a fire extinguisher or two somewhere about the wharf; or a hose so stretched or reeled that it could not become tangled in handling it; or gangways running lengthwise in the centre of the shed, leading from one hydrant to another, and many other facts which the plaintiffs claimed might justly lead to the conclusion of negligence.

(1.) The Appellate Court says the fire

> "was discovered immediately, but spread so rapidly that all efforts to extinguish it were unavailing,"

but fails even to indicate why, when the aforesaid "all efforts" consisted of an old man and a boy tugging in the darkness under the sheds at a tangled hose, the plaintiffs were not entitled to ask a jury whether such efforts were sufficient efforts, though in a later part of its opinion it says

> "that the defendant, by keeping a larger force of watchmen at its wharf, might have more efficiently protected its property from risk is a fact that may be assumed to be proved by the evidence."

(2.) The only alleged act of negligence which that Court considered worthy of consideration was not, it says, in fact, negligence, but simply an error of judgment on the part of one of defendant's employees,

for which it was not liable, and this error of judgment consists, it is said, in Valle turning on the water before he straightened out the hose.

The statement of the Circuit Court of Appeals is that—

> "The evidence upon the second issue, introduced for the purpose of showing that the fire should have been extinguished earlier, merely *tended to prove* that it could and *probably* would have been extinguished earlier *if an employee* of the defendant *had not in a moment of excitement and peril failed to exercise the good judgment of a deliberate occasion*" (p. 209).

And those acts of this employee, in the doing of which he is said to have failed to exercise good judgment, are stated by the Court as follows:

> "The watchman who discovered the fire immediately ran to the hydrant, turned on the water, uncoiled part of the hose, clambered up on top of the bales, carrying the end of the hose and directed the hose upon the fire, but the water would not run from the nozzle." * * * (p. 209).
>
> "*The evidence indicates* that the hose had become kinked while the watchman was carrying it to the place of the fire and that *the water in it made it so heavy and cumbrous that it could not be straightened out in the few seconds available so as to permit the water to escape. This probably would not have happened if the requisite length of hose to reach the fire had been unwound from the post and straightened out before the water was turned on.* This, however, would have involved delay, and seconds were precious. There was a chance that what did happen would happen, but we do not think a jury would have been justified in finding that the watchman was in fault for not anticipating and providing against the contingency" (p. 209).

We have shhown that the evidence in the case at bar, instead of indicating, as said by the Circuit Court

of Appeals, "that the hose became kinked while the watchman was carrying it" (p. 507), or, as stated by the Circuit Court, that the hose became kinked by being thrown down either accidentally or intentionally by Valle (p. 164), established the fact that the hose was tangled—not kinked.

There is no evidence to show at what point in this one hundred feet of hose the tangle occurred, or to show that the hose was not tangled before Valle first saw the fire. *There is no evidence to show that Valle had not actually tried to straighten out the hose before he discovered that it was tangled, nor is there any evidence to show that he turned on the water first; indeed it does not even appear that he turned it on at all*, for the mere fact that it was turned on when Robeau got there does not establish the fact that Valle turned it on. All that does appear is that Valle, standing with the hose in his hands, called to Robeau to turn on the water, and that Robeau went to the valve, found the water turned on and the hose leaking. But Robeau did not know who turned on the water (p. 159). *There is absolutely no evidence to show that Valle in any way caused the tangle in the hose*, or that the pressure of water tangled the hose, or how it was tangled or where it was tangled. When Robeau got to Valle THEY COULD GET NO WATER THROUGH THE HOSE. Both of them together were unable to untangle it from where they were on top of the cotton, and neither would go down on the platform to try and fix it.

An insuperable difficulty with the statement by the Court that Valle made an error of judgment is, then, we respectfully submit, that *there is absolutely no evidence to show what this watchman Valle did between the time of the discovery of the fire and the time when he was found by Robeau standing on the cotton pulling on the hose* (see testimony of Robeau, pp. 151, *et seq.*).

Valle was not called, and no one was called who

saw what Valle did or testifies to what he said he did.

The statement of the Court of Appeals that Valle, the watchman who discovered the fire, "immediately ran to the hydrant, *turned on the water, uncoiled part of the hose*, and clambered up on top of the cotton carrying the end of the hose," is wholly conjecture; is not a statement of a fact contained in the testimony, but *is simply a statement of the Court's belief or inference as to what he did.*

But if it had appeared what Valle in fact did, it would have been for the *jury* to say whether Valle did, in fact, make an error of judgment. And if they had found that Valle had made an error of judgment, would it not have been for them to say whether such error of judgment was the cause of the loss? They might have found, as the plaintiffs think very justly, that no water would have come out of the nozzle even if the hose had been straightened out. In any event, it was for the *jury* to say.

The decision of each of the Courts below was based on *the inference, which they drew* from the testimony, that Valle turned on the water before he tried to uncoil the hose. Each Court then drew the inference that this was an error of judgment. Each Court then drew the inference *without any testimony to support it* that if he had not done this, but had uncoiled the hose before he turned on the valve, plenty of water would have resulted and the fire been extinguished.

But the law is well settled that

> "*If the fact is to be inferred from the evidence, it must be drawn by a jury, not by the Court.*"
>
> *Bolton* v. *Baxter*, 58 *N. Y.*, 411, *at p.* 415.

> "The presumption of the existence of one fact from the existence of another, that is, the process of ascertaining one fact from the proof of another fact, is within the exclusive province of the jury."
>
> *Justice* v. *Lang*, 52 N. Y., 323, at p. 328.

See also

Hackford v. *N. Y. C. & H. R. R. Co.*, 53 *N. Y.*, 634.

Bernhard v. *Rensselaer & S. R. R. Co.*, 1 *Abb. Ct. of App. Decs.*, 131.

The conclusion of both Courts below was that Valle failed to exercise good judgment in doing what both Courts *infer* that he did.

But, said the Court in *Bernhard* v. *Rensselaer & S. R. R. Co.* (*supra*), after holding that such inferences can only be drawn by the jury,

> "If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved, this involving, as it generally must, more or less conjecture, can only be settled by a jury."

An error of judgment implies, of course, a possibility of two courses.

The error of judgment which the Court finds as a fact, without support from the evidence or authority in the law, is that Valle should have straightened out the hose before he turned on the water.

But there is absolutely no testimony that Valle could have done this, and there is nothing in the testimony to show that he did not try to do this and find it impossible. There is nothing in the testimony to show that this was not the very thing that he was trying to do when Robeau reached him.

In order, then, to reach the conclusion that this error of judgment was made by Valle, the Appellate Court

First. Draws inferences which should be drawn by the jury only.

Second. Draws inferences which are wholly unsupported by the evidence.

Third. Blames Valle for not doing a thing which there is no proof he did not attempt to do and failed.

Fourth. Concludes that if Valle had done what the

Court thinks he ought to have done, the fire would *probably* have been extinguished.

We should not omit to state that the Court of Appeals, in reaching its conclusion of an error of judgment committed by Valle, was perhaps led into this error by such statements in the brief below on behalf of the defendant as these:

> "The testimony shows that Valle had opened the valve, and that the water was pressing out into the hose to such an extent that both Valle and Robeau together were unable to straighten the hose so that the water would come through the pipe which Valle had in his hand * * *."
>
> "Supposing that before opening the valve, Valle had anticipated that which evidently occurred, that the pressure of water would be so strong that he would be unable to pull the hose apart and straight when the water was thus let into it, he had straightened the hose in advance," &c.
>
> "Valle, not anticipating that which did happen, a greater pressure of water in the hose than he had foreseen, and thereby entirely choking the flow of water through the hose," &c.

The testimony gives no warrant for any such assertions.

(*c.*) Admitting for the purpose of the argument the rule sought to be here applied by the Court of Appeals, that the defendant is not liable for a mere error of judgment of its employee, we insist that in the case at bar, unlike any of the cases cited by the Court of Appeals, there are absolutely no facts proved tending to establish the commission of an error of judgment, and that if there were, *it was the province of the jury upon all the evidence to draw the inferences therefrom.*

The province of the Court, if it had been known what Valle in fact did, was at most to instruct the jury on this branch of the case as to what con-

stituted an error of judgment, and to tell them that if from all the facts they believed that the failure to extinguish this fire resulted solely from an error of judgment committed by Valle, the defendant was not liable therefor.

The Court could not properly instruct the jury as to what inference they must draw from the facts, and could only direct a verdict for defendant

> "when the evidence given at the trial, *with all the inferences which the jury could justifiably draw therefrom,*"

would be insufficient to support a verdict for the plaintiffs.

> *Schofield* v. *Chicago, M. & St. P. R. Co.*, 114 *U. S.*, 615.

(*d.*) The quotation from the case of *Thurber* v. *Harlem R. Co.*, 60 *N. Y.*, 336, cited by the Circuit Court of Appeals, was a mere statement of a rule said to be in harmony with a decision in that case, but that rule has no application to the case at bar *until the jury shall have drawn the inference that an error of judgment was committed.*

This case is an authority for our contention that *it was for the jury*, and not for the Court, *to determine what Valle did and whether or not, in the doing of those things, he committed an error of judgment.* In that case, in discussing the question as to whether or not the plaintiff was guilty of contributory negligence in attempting to cross in front of the defendant's car, the Court said:

> "Negligence is a question of fact and should usually be decided as such, especially whenever men of ordinary prudence and discretion might differ as to the character of the act, under the circumstances of the case, the positions and conditions of the parties. If the plaintiff had been of maturer years and of ripe judgment it would still have been a question for the jury whether it was prudent and proper for him, in the exercise of that ordinary care which he

> was called upon to use, to attempt to cross the street in front of the defendant's car. The actual result does not necessarily condemn the act as rash, or even negligent. *It may only prove an error of judgment, and in such case it is for the jury to say whether a man of ordinary prudence and discretion might not, under the same circumstances, have formed and acted upon the same judgment.*"
>
> *Thurber* v. *Harlem &c.* (*supra*).

The case of *Union Pacific R. R. Co.* v. *McDonald*, 152 *U. S.*, 281, was cited by the Court of Appeals merely as approving the statement taken from the Thurber case.

In *Winn* v. *Railroad Co.*, 133 *N. Y.*, 575; *Bitner* v. *Crosstown Railway Co.*, 153 *N. Y.*, 76, and *Stakeman* v. *Railroad Co.*, 155 *N. Y.*, 511, all cited by the Court of Appeals, and in the subsequent case of *Lewis* vs. *Long Island R. R. Co.*, 162 N. Y., 52, it was decided that the companies were not liable for an error of judgment. But in each one of these cases *the acts of the employee were proven, known or admitted, and the holding of the Court was that his failure to do other things was a mere error of judgment.*

Those cases can have no application to the case at bar, however, because in this case the acts of the employee were not proven, known or admitted; *it was not proven that Valle did not find the hose badly tangled, nor was it proven that he did not manage the hose in the most skillful manner and in the manner in which any reasonable man would have done*, in which event its absolute failure to work would have been evidence of negligence, and in no sense of an error of judgment.

In its brief below the defendant said:

> "To submit the case to the jury to determine what Valle did before Robeau got there, is, in view of what Robeau states respecting the situation of affairs, to allow the jury to guess as to what occurred, is to allow them to proceed upon conjecture and surmise and uncertainty."

The defendant here admits that what Valle did before Robeau got there is unknown. This admission completely undermines the position of the defendant, for, as we say, the Court, admitting for the purposes of the argument that it had any right to draw any inference at all on the subject, could not draw the inference of an error of judgment in Valle, when it did not know what Valle did.

(c.) But in any event, it cannot be said that an error in judgment in Valle would relieve the defendant, until the defendant had shown that Valle was an experienced person in the business in which he was employed. Valle may have been a good watchman; he may have answered the purpose to scare off thieves—but what kind of a fireman he was does not appear.

A railway company may perhaps be relieved from the consequences of a collision of its locomotive, if it shows that upon such locomotive it had an experienced engineer, and such engineer made, in the opinion of the jury, a mistake in judgment which was the cause of the accident; but should it appear that on that locomotive as an engineer, the railway company had employed Valle, or any other youth who had never run an engine before, how can it be said that any act of such inexperienced youth so placed, was an error of judgment in a moment of peril? That to run locomotives without negligence a railway company must employ men skilled in the business, is too clear a proposition for discussion. It is no less incumbent upon a railway company to employ skilled men to put out fires in cotton, or at least the jury should have had the opportunity to say whether Valle and Robeau were proper men to have been employed. The defendant here is surely chargeable with the special knowledge that if a fire started in this mass of cotton on this wharf on November 12th it was all the more dangerous from the manner in which these bales of cotton were piled and crowded and jammed

together; that under such circumstances the fire was very much harder to get at and very much harder to handle. To say that the boy Valle, not shown to have had the slightest experience in handling fire apparatus of any kind or extinguishing fires in cotton, made an error in judgment, and that if such alleged error of judgment had not occurred the loss would not have happened, is, in any event, we submit, wholly untenable.

(*G.*) The contention of this defendant in the courts below, that to send this case to the jury would have been to leave it to be determined by mere guess or conjecture, is not sound.

> "It was objected by the learned counsel for the appellants that this evidence [*i. e.*, opinions of witnesses as to the cause of the giving way of an embankment] amounted only to theory and conjecture, and that the jury ought not to have been permitted to act upon it. To this it may be answered, that although the circumstances which occasioned the accident were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment."
>
> *Great W. R. Co. of Canada* v. *Braid, and Same* v. *Fawcett*, 1 *Mo. P. C.* (New Series), 101, at p. 116.

Even on the single question of the condition of the fire apparatus, leaving out all other considerations, in the case at bar the failure of the hose to work was proved, but the causes which produced this failure could only be determined by the jury.

In its brief below, the defendant further said:

> "If the transaction can be explained upon the theory of an error of judgment, then the plaintiff is not entitled to go to the jury. If it is equally explicable upon the theory of negligence, or upon the theory of an error of judgment, or mistake, they are equally not entitled to go to the jury."

The language of the New York Court of Appeals in *Hart* v. *Hudson River Bridge Co.*, 80 N. Y., 622, is particularly applicable on this point to the case at bar. It is as follows:

> "While in an action to recover damages for the death of one who fell from defendant's bridge and was killed, through defendant's negligence, it was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of death, it was not necessary to do this by positive and direct evidence of the negligence of defendant and of the freedom from negligence of the deceased. *Circumstances may be shown from which an inference of the necessary facts may be drawn, and when the circumstances are such that the inferences to be drawn are not certain and incontrovertible, but may be differently made by different minds, it is for the jury to determine them* (Justice *v.* Lang, 52 N. Y., 323). And it is not necessary to warrant this Court in adjudging that there was error in granting a new suit, to be convinced that the legal probabilities are so strong as that the plaintiff is entitled to a verdict. What it has to arrive at is that there were facts in the case which were not so weak as to give no support, in some fair and sound mind, to such legal probabilities as that the law will tolerate that a verdict should be founded upon them."

See also

Quaife v. *Chicago & N. W. R. R. Co.*, 48 *Wis.*, 513, 519–520.

Whitney v. *Clifford*, 57 *Wis.*, 156.

The same rule is stated in equally strong terms in *Seybolt* v. *N. Y., L. E. & W. R. R. Co.*, 95 N. Y., 562, the Court saying:

> "*We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt.*"

(*H.*) Were it essential to the plaintiffs' position to show that, in the absence of evidence by the defendant, they were entitled to a direction of a verdict, the following cases would support this contention:

> "A presumption of negligence from the simple occurrence of an accident seldom arises *except* where the accident proceeds from an act of such a character that when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or *where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control and for the management or construction of which he is responsible.*"
>
> *Transportation Co.* v. *Downer*, 11 *Wall.*, 129.

Or as stated in *Scott* v. *London Dock Co.*, 3 *Hurl & Root*, 596:

> "There must be reasonable evidence of negligence. *But where a thing is shown to be under the management of the defendant or his servants, and* THE ACCIDENT IS SUCH AS IN THE ORDINARY COURSE OF THINGS DOES NOT HAPPEN IF THOSE WHO HAVE THE MANAGEMENT USE PROPER CARE, *it affords reasonable evidence* in the absence of explanation by the defendants *that the accident arose from want of care.*"

The case last mentioned was distinguished by the Court in Transportation Co. *v.* Downer (*supra*), on the ground that the grounding of the propeller, the alleged negligence in that case, "may have been consistent with the highest care and skill of the master," but we apprehend that the fact that this hose in an emergency such as was reasonably to be expected, and in the hands of the men especially selected to work it, was found to be in such a condition as to absolutely prevent its use, can hardly be said to be "consistent with the highest care and skill" on the part of this defendant.

See also *Hicks* v. *New York, &c., Railroad*, 264

Mass., 424, at p. 427, holding that the failure of electric bells to ring at the approach of a train was evidence of negligence; and *Kennedy* v. *McAllaster*, *31 App. Div., 453*, holding that the falling of an elevator *while being used for the purpose for which it was intended would be evidence it was defective and unsafe, and if not satisfactorily explained, would be sufficient evidence to authorize the jury to find negligence.*

Scott v. *London Dock Co.* (*supra.*)

In this connection we beg to call the attention of the Court to the most recent review in the New York Court of Appeals, of this question of *res ipsa loquitur*. It is given in the case of *Griffen* vs. *Manice*, *166 N. Y., 188*, where the opinion is written by Cullen, *J.*

The recent authorities and text books are there reviewed in a lucid manner, and under the authority of this and preceding cases, we submit that it is clear that in this case a presumption of negligence arose, and that the *plaintiffs* were entitled to the direction of a verdict.

Second Point.

The taking of the cotton in suit to Westwego and its detention at that point, for the purpose of there making delivery thereof to the steamship line, constituted a deviation from the regular and usual course of transportation, and the defendant thereby forfeited all exemptions in its favor contained in the bill of lading, or at least the plaintiffs were entitled to go to the jury on the question whether such treatment of the cotton was so well known, through com-

mercial custom of long standing, or so general or so universal, as to be fairly within the constructive knowledge of the shippers.

A deviation, said this Court in *Hostetter against Park*, 137 *U. S.*, 30, at page 40,

> "is defined to be 'a voluntary departure, without necessity or reasonable cause, from the regular and usual course' of a voyage."

And the rule of law is well settled

> "that by deviating from the manner of the carriage the carrier loses the benefit of any exemption in his contract."
>
> *Lawson on Carriers, Sec.* 139.
>
> *Hutchinson on Carriers, Secs.* 340 *et seq. and cases cited.*
>
> *Crosby* v. *Fitch*, 12 *Conn.*, 410.
>
> *Express Co.* vs. *Kountze*, 8 *Wall.*, 342.
>
> *Maghee* v. *R. R. Co.*, 45 *N. Y.*, 514.

And

> "No rule is better settled than that the delivery must be according to the custom and usage of the port."
>
> *Constable* v. *National Steamship Co.*, 154 *U. S.*, 51, *at p.* 63.

The shippers of this cotton, therefore, had

> "a right to expect a delivery of their goods according to the *established* custom and usage of the port, *and in that part of the port customarily used for the discharge [delivery] of such goods; and the vessel [this defendant] is bound * * * to make delivery accordingly.*"
>
> *Derato* v. *823 Barrels of Plumbago*, 20 *F. R.*, 510, *at p.* 516.

(4.) It appears, of course, that the deviation was material, for the cotton was destroyed at Westwego,

See Vos *vs.* Robinson, 9 John., 192.
Fernandez *vs.* Great Western Ins. Co., 48 N. Y., 571.

and would not have been destroyed if it had been taken to New Orleans.

(*B.*) Westwego not being mentioned in the bill of lading, if it was not, by established custom and usage, that part of the port of New Orleans customarily used for the transfer of shipments from one carrier to another, and if the taking of this cotton to Westwego was not according to the established custom and usage of the port, but constituted a voluntary departure, without notice to the plaintiffs, and without necessity or reasonable cause, from the regular and usual course of transportation, the defendant must likewise be held to have lost the benefit of all the exemptions in the bill of lading contained.

In *Reiss* v. *Texas & P. R. Co.*, *98 F. R.*, *544*, it was said, by the Circuit Court of Appeals:

> "The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the port of New Orleans, and that, therefore, the defendant had no right to unload it at Westwego. It is true that Westwego was not, in 1894, within the boundaries of the port of New Orleans, as defined in the Statutes of the United States, but it was, so far as export cotton is concerned, that port in the well understood commercial and business sense, and was the part of the port of New Orleans where steamship companies rightfully expected to receive cotton from Texas for transportation to Europe."

This statement of the Circuit Court of Appeals, that Westwego was within the port "in the well understood commercial and business sense" is not, we contend, warranted by the evidence in this case.

By the whole record herein, the existence of certain facts relative to the business done by this defendant at Westwego is clearly established, viz.:

(1) The bill of lading was on a form to take effect July 1, 1893 (p. 169), two months before the first cotton was ever delivered from Westwego.

Prior to September, 1893, it was the defendant's universal custom and usage as to *all of the cotton shipped over its road* "to the port of New Orleans," to be from thence transported to foreign ports, was to transport such cotton to New Orleans, on the New Orleans side of the river and to deliver it to the steamships at the City Front.

(2) That after September, 1893, and solely by reason of certain arrangements made by it with the various steamship lines in New Orleans, *which, however, were absolutely unknown to the shippers,* the defendant took its *export cotton only* to Westwego and make delivery of it there, provided it should accumulate a certain number of bales at that point, it being expressly understood that *no delivery could be made there except under the conditions specified.*

The testimony of Sanders, one of the agents for steamships, *as to the contracts made by defendant and the use therein of the words "delivery unrestricted,"* is

> *"This is a peculiar form of delivery which is used only by the Texas and Pacific railway and certain connections of theirs in Texas. The usual form of engagement note calls, as a rule, for a certain date of delivery to the vessel"* (p. 109).

See contracts covering shipment in suit (pp. 176 and 177).

(3) That since September, 1893, defendant had made an arbitrary division of the cotton coming over its road "to the port of New Orleans" carrying only its "export cotton" to West-Wego, while it continued to carry its "east bound" and other cotton to New Orleans as it had always theretofore carried all its cotton.

(4) That notwithstanding these peculiar arrangements under which *alone* delivery of export cotton would be accepted by the ships at Westwego it was

still the custom at New Orleans in 1894, the time of this fire, for defendant, if it had less than one thousand bales of cotton (in some cases more) to deliver to the ships, to carry them to New Orleans and there deliver them, or else hold them at Westwego until it should accumulate enough more bales at that point to enable it to procure the sending of a ship to take them, and that the custom of carrying cotton to the city front still obtained in 1894 as to all cotton which the steamship lines had not agreed to receive at Westwego under one of the special contracts.

(5) That these arrangements, under which cotton was carried to Westwego, were absolutely unknown to the shippers; and

(6) That in accordance with the custom in force at New Orleans in 1894, as of which time only we must consider this case, the defendant was bound to carry these 100 bales of cotton to New Orleans and there deliver it to Elder, Dempster & Company, and that in accordance with this custom it would have done so had it not been for the fact that its contract with this line, under which it proposed to deliver this cotton, provided for "delivery unrestricted" (p. 176), thereby enabling defendant to carry this shipment to Westwego, there to be held until it could get together the 2,000 bales necessary for it to have there before Elder, Dempster & Company would send a steamer there to accept delivery of it.

It must be borne in mind that the steamship companies never knew what particular shipment of cotton was to be delivered to them by the defendant under one of these special contracts until, after the cotton had arrived, the defendant sent them a notice of arrival and a specification of what contract the cotton was to be carried under, and notwithstanding the contract between defendant and Elder, Dempster & Company, referred to in the bill of lading simply as "T. & P.

No. 73" (p. 169), this defendant would have had a clear right to deliver this cotton in New Orleans. There is nothing to show that this contract, "T. & P., No. 73" (pp. 176 and 177), applied to this cotton specifically. It was simply a contract for 3,000 bales, absolutely unidentified, and the Steamship Company could not have refused to accept a delivery of this cotton in New Orleans "on the steamship pier at the said port" (bill lading, clause 12, p. 172) if delivery had there been tendered.

> "The company [defendant] had no right to assume, in discharge of its obligation, * * * that an offer to deliver this particular shipment would have been met by a refusal to receive."
>
> *Railroad Co.* v. *Manufacturing Co.*, 18 *Wall.*, 318, *at p.* 325.

We concede, at the outset, that in 1894, only one season after the erection of this dock at Westwego, most of the steamship lines went to Westwego to receive export cotton, and that at that time most of defendant's *export* cotton was delivered at that point.

But we contend that this method of delivery by virtue of these secret arrangements between the defendant and the steamship lines, absolutely unknown to the shippers, was not notorious, and had not been so long established or become so well known and understood as to change the custom and usage theretofore observed by this defendant in carrying all its cotton to New Orleans and there delivering it.

We concede also that it was customary for the steamships to go to other railroad terminals in New Orleans for cotton. Under what arrangements they went there, and under what bills of lading cotton so delivered was shipped, does not, however, appear, and it is established that, with the possible exception of the preceding season, defendant's terminal for this class of cotton as well as for all other freight was in New Orleans, and that all deliveries were made there.

These shippers, when contracting for the carriage of this cotton "to the port of New Orleans," there to be delivered to the steamship line, were entitled to assume and *must be presumed to have understood that such cotton would be carried to the City of New Orleans, and there delivered to the steamship line* WITH ALL REASONABLE DESPATCH, at which place it would, during the interval between its arrival and its departure on the ship, be under the protection afforded by the fire and police departments of the City of New Orleans. Hence the taking of this small shipment of 100 bales to Westwego, a point at which it had absolutely no fire and police protection, except such as this defendant choose to afford it, and its detention at that point for five days (from November 7th to 12th, p. 29), during which time no attempt to even unload it was made (p. 29), constituted a material deviation of which defendant must bear the consequences.

We do not, as the Circuit Court of Appeals seems to have inferred in the *Reiss* case, question the right of these carriers to agree between themselves, to send the steamers to Westwego, if they chose to, nor, in view of the contracts which existed as between defendant and these companies—peculiar contracts only used by this road—do we question the right of these steamship companies to expect to receive at Westwego cotton covered by these contracts, and to be transported by them to European ports. The practice of the parties as between themselves, *has, however, nothing to do with the contracts of carriage so far as these shippers are concerned.*

What we do contend is that the sudden diversion, during only one season, of export cotton *only* to Westwego, "*an out of the way place*" (p. 135), by defendant, alone, out of the many competing lines of railroad centering in New Orleans—the greatest cotton mart in the United States—while it continued to carry all its other cotton to New Orleans, such diversion being made solely by virtue of certain special arrangements peculiar to

this road and made at defendant's request and for its sole benefit, between itself and these steamship companies, *wholly unknown to the shippers*, the making of which was necessary in order to enable defendant to make deliveries of export cotton at Westwego, was not a carriage in accordance with the regular and usual course of transportation, or in accordance with the terms of a bill of lading calling for transportation to the port of New Orleans, and did not operate to change the custom which had theretofore been universal, viz., to carry all cotton directed "to be carried to the port of New Orleans," to the City of New Orleans, and to make delivery thereof at the City Front.

The permanent Committee which drew this Bill of Lading to go into effect on July 1, 1893, evidently did not contemplate any delivery at Westwego, or the bill of lading would have mentioned it. The testimony shows that, up to the fall of 1893, a delivery of cotton consigned to the port of New Orleans could not physically have been made at Westwego.

No one ever considered Westwego as commercially within the port of New Orleans. In 1894 the merchants of New Orleans did not consider it as in the port, and the steamship agents, *the only people who had anything to do with Westwego*, did not consider it as being in the port *except* for more than 1,000 bales of cotton, and would not go there, and could not be forced to go there, for less than that amount.

Therefore, we insist that when these shippers received this bill of lading calling for the carriage of only 100 bales of cotton "*to the port of New Orleans, La.*," there to be delivered to the steamship, they were entitled to rely, and did rely, on the fact that those words *meant*, as they had always theretofore meant, *the City of New Orleans*, which was the place wherein ships and merchants were accustomed to receive and deliver such shipments, and to which place, by the custom of the port, these 100 bales would have to be carried before a tender of de-

livery could be made, which, as to a shipment of only 100 bales, it would be obligatory on the steamship line to accept.

In this connection we call the attention of this Court to the map inserted in and made a part of their opinion in *New Orleans* vs. *Texas and Pacific Railway*, 171 *U. S.*, 312, *at page* 335, which shows in accordance with the testimony in this case the whole situation as to the commercial limits of the port of New Orleans, and upon which are shown the line of defendant's railway from Westwego, eight miles down to Gouldsboro, opposite the Texas and Pacific depot in New Orleans; the location with reference to Westwego of the "S. S. wharves," the "Stuyvesant docks" and the "commercial front."

Westwego was not within the legal limits of the port of New Orleans. *It was expressly conceded by defendant, on the trial,*

> "*As a matter of fact, that the east bank of river in the city of New Orleans is the port of New Orleans*, AND WAS THE PORT OF NEW ORLEANS IN 1894" (p. 9),

and also

> "that prior to March 20, 1896, it (Westwego) was not within the designated limits of the port of entry, the customs district, as defined by the act of Congress" (p. 9).

In order, therefore, to enable this defendant to successfully maintain its contention that it was entitled to carry this cotton to Westwego and hold it there for delivery until other cotton accumulated there, when, by the express terms of the bill of lading it was to be carried "to the port of New Orleans," a practice of so taking and holding cotton must be shown, which was so open and notorious and had become so general and so well established as to be fairly and reasonably presumed

to be recognized by shippers generally, otherwise *these shippers who had no knowledge of Westwego and no notice of defendant's alleged practice will not be bound by it.*

Devato v. 823 *Barrels of Plumbago*, 21 F. R., 510.

(Wacco v. Bailey, 49 L. R. A. 464-476 re.

But as shown above, this alleged practice did not exist at all prior to the Fall of 1893, between which time and the time of this fire only one cotton season had passed.

Miller, defendant's main freight agent, testified regarding deliveries to Elder, Dempster & Company, the line which was to carry the cotton in suit, as follows:

> "Q. You were enquired of respecting Elder, Dempster & Company's wharf, in the City of New Orleans; was it the custom of the Texas and Pacific Railway Company to ever deliver cotton to Elder, Dempster & Co. at that wharf? A. At times.
>
> Q. That is *what kind of cotton or nature or sort of shipments were delivered to Elder, Dempster & Co. in New Orleans?* A. *Practically the same class of cotton as that we were handling at Westwego;* but it was not the custom to make deliveries at that wharf of Elder, Dempster & Company in the city at that time. At that time we were handling their business at Westwego.
>
> Q. And for how long had you been handling it at Westwego? A. Probably for a month or a month and a half previous to the fire, as to that particular season of 1894-95. It had been so handled the previous season at Westwego" (p. 31).

An analagous case is *The Sultana* v. 3,000 *Empty Oil Barrels*, 15 *F. R.*, 618, in which case it appeared that on August 20, 1881, 7,061 empty petroleum barrels were shipped on the *Sultana*, the bill of lading stipulating that the same should be delivered at "*the port of Philadelphia*," at a wharf to be selected by the consignees. The Chester Oil Company was

See also Am. & Eng. Ency. of Law, Vol. 27, pp. 710-718-721, & cases cited.

established in March, 1881, and a large proportion of the barrels afterwards consigned to the port of Philadelphia were discharged at Chester. The *Sultana* arrived at the City of Philadelphia on September 20, 1881, and was requested to go back and discharge at Chester. This the master refused to do, and thereupon discharged at a wharf in Philadelphia and filed a libel for freight.

The respondent claimed that *one-third of the oil business of the port was done at Chester*, and that it was a custom of the port to discharge at that place. The libellant contended that a custom of five months was not sufficient to affect its contract, and the Court said:

> "The defense is not sustained. Upon arrival of the cargo at Philadelphia, where the charter required it to be brought, the respondent ordered it brought back to Chester, several miles below, claiming a right to do so under the contract. Conceding Chester to be without the limits of Philadelphia, the respondent sets up a custom which, he says, required it to be treated as within, where the particular commerce to which this contract relates is involved.
>
> Without entering upon a discussion of the subject, it is sufficient to say that no such custom existed at the date of this contract; whether one exists now, need not be considered. In the case under consideration the proof is insufficient. That many outward-bound vessels under contract to carry oil from Philadelphia had, within two or three months preceding the date of this charter, loaded at Chester, and inward bound vessels loaded with oil or oil casks, had reloaded there, is unimportant. In each instance Chester was directly on the way, and a request so to load or unload tended to the carrier's relief, and would therefore be favorably received. No instance is shown of a vessel carrying her cargo back to Chester under such a contract."

In the case at bar the alleged custom, it is true, had been in existence a few months longer than that in the case cited, but it is also true that in the case at bar the alleged custom affected only a single class of shipments, viz., "export cotton" brought to New Orleans over the line of only one of many railroads, whereas in the case cited it was contended that one-third of all the oil business of the port was done at Chester.

Philadelphia was situated on a river, as is New Orleans, with Chester several miles below, as, in the case at bar, Westwego is several miles above. As was said by the Court in *The Sultana* "no instance is shown of a vessel carrying her cargo back to Chester," so in the case at bar no instance is shown of any vessel being sent up to Westwego for a shipment of 100 bales of cotton, and no instance is shown of a vessel ever going there except by special contract and under the peculiar and express conditions as to quantity above set forth. The alleged custom set up by defendant in the case at bar was no stronger than that in the case cited, and, as in that case, should not be allowed to afford protection to the wrongdoer.

The determination of the commercial meaning of the words "Port of New York" was among the questions discussed and answered by Judge Brown in *Devato* v. *823 Barrels of Plumbago*, 20 *F. R.*, 510 (cited *supra*), and the reasoning of the learned Judge in that case, long recognized as the leading authority on this subject, seems to us to be decisive in plaintiffs' favor, of this point.

In that case plumbago was brought from Ceylon and discharged at Pierrepont's Stores, Brooklyn, immediately adjacent to Wall Street Ferry. The plumbago was shipped under a bill of lading which described the bark as "bound for New York," and that the goods were to be "delivered at the aforesaid port of New York." The single question presented concerned the right of the vessel, under such

a bill of lading, to make delivery of the cargo in Brooklyn, and the Court says:

> "For some thirty years past there has existed at this port a controversy, or something in the nature of a controversy, between ship owners and importers as to the right of a vessel to make delivery of cargo consigned to 'the Port of New York' on the adjacent shores of Brooklyn, Jersey City or Hoboken. The evidence shows that it began some thirty or thirty-five years ago, about which time some of the steamship lines began to go to Jersey City. Complaint was immediately made by the merchants in regard to that practice, and some compensation was paid for the extra expense of ferriage. This liability was soon avoided by an alteration of the terms of the bills of lading, so as to give liberty to discharge at Jersey City; and several lines now provide generally for an option to discharge at Jersey City, Hoboken or New York. About the same time commodious warehouses began to be erected in Brooklyn, which now extend almost continuously from Fulton ferry to below Hamilton ferry, on the Brooklyn side. These warehouses, with the docks to which they are adjacent, furnish superior facilities for the ready handling and storage of cargo; and *during the last twenty-five years they have been more and more used* for storing goods not intended for immediate consumption. In certain lines of business, the East India trade particularly, *a large majority of the cargoes of late years have come to be discharged at the Brooklyn stores;* and this tendency has lately been still further increased by the erection of the Brooklyn Bridge, as the vessels engaged in that trade are mostly unable to go above the bridge without housing their topmasts. DURING THE LAST FIVE YEARS, as the evidence shows, ALMOST ALL THE VESSELS FROM COLOMBO AND CEYLON HAVE DISCHARGED AT BROOKLYN. * * *
>
> Many witnesses for the libellants testify to the practice of late years of landing nearly all the cargoes from Ceylon at Brooklyn, as above stated. * * *
>
> The first ground of defense is that a delivery

at Brooklyn is not a fulfillment of the contract contained in this bill of lading, because the bill of lading describes the vessel as 'bound for New York,' and makes the goods deliverable 'at the aforesaid port of New York.' If this contention is sound no freight was earned (*The Boston*, 1 Low, 464). This contention, however, cannot prevail for the wharves are clearly within the legal limits of the 'port of New York,' and hence within the possible limits of the port, as commercially understood.

* * * * *

2. It does not follow, however, that a delivery of cargo is necessarily a good delivery because within the legal limits of the port. Such is not the meaning or intention of the bill of lading. *No one would seriously contend that under a bill of lading like this goods consigned to a merchant in New York City could be lawfully delivered at Spuyten Duyvel, some thirteen miles above the Battery, at the mere option of the captain, because Spuyten Duyvel is within the geographical limits of the city and port of New York, or at Throg's Neck, or at Sandy Hook, because those places are also within the legal limits of the port.*

A bill of lading is a commercial document, to be interpreted according to the usages of commerce. * * * *The port is not any place within the geographical limits of the same name where ships might load and unload, but where they in fact do so, i. e., where they are accustomed to do so.* Commercially considered, a port is a place where vessels are in the habit of loading or unloading goods; *and the limits of the port, as respects a delivery under the bill of lading, turn purely upon the question of fact, within what limits ships and merchants have been accustomed to receive and deliver cargo consigned to the port designated*, without any necessary regard to geographical or political divisions, or to police or statutory regulations. *Consignees of goods at a designated port have a right to expect a delivery of their goods according to the established custom and usage of the port, and in that part of the port cus-*

tomarily used for the discharge of such goods, and the vessel is bound, and has a right, to make delivery accordingly (citing cases).

What begins in special agreement may, ere long, end in a prevailing custom, either in general trade or in a particular traffic; and THE QUESTION IN ANY PARTICULAR CASE MUST BE, WHETHER THE PRACTICE OF LANDING AT SUCH PARTS OF THE PORT HAS BECOME SO GENERAL AND SO ESTABLISHED AS TO BE FAIRLY AND REASONABLY ENTITLED TO BE RECOGNIZED AS WITHIN THOSE LIMITS WHEREIN THE MERCHANTS OF THE PORT ORDINARILY RECEIVE, AND VESSELS ORDINARILY DISCHARGE, SUCH GOODS. * * *

Tested by the rules laid down by Judge Brown in the *Devato case* it seems to us clear that Westwego was not within the port of New Orleans commercially considered.

In the Devato case a controversy as to the right to make delivery in Brooklyn had existed for some thirty years.

In the case at bar, however, no controversy had as yet arisen, because, and this is significant, only "export cotton" was taken to Westwego, a fact that the shippers, who were away from New Orleans, were never aware of, and therefore raised no controversy over, whereas if defendant had undertaken to deliver other cotton or other goods at that point, such delivery would have been refused and a controversy would quickly have arisen (see testimony of Woods, Fallon, Westfeldt and Harris). Again in the Devato case for almost *five years* previous to that case "almost all the vessels from Colombo and Ceylon have discharged in Brooklyn," whereas in the case at bar deliveries of this one class of goods had been made at Westwego for only a few months, one cotton season. Nor was Westwego within the legal limits of the port of New Orleans. The merchants of New Orleans were not accustomed to receive or deliver at Westwego cargo consigned to the port of New Orleans, indeed

their testimony goes further and shows that they would not do so.

In the case at bar no pretense is made of crowding in New Orleans or that it was inconvenient for any one, but defendant, to deliver or receive cotton there. The greater economy resulting from the holding of cotton at Westwego inured solely to the benefit of the defendant, for *it is not shown that the rate of freight for cotton carried via Westwego was less than that of cotton carried to New Orleans.* Nor can it be said, in the face of the evidence, that greater dispatch was afforded to cotton at Westwego (where it must, of necessity, be held to await a sufficient accumulation to enable it to be sent forward) than at New Orleans, where defendant could by the express terms of clause 12 of the bill of lading carry it to the steamship pier and there deliver it forthwith and compel the steamship to receive it.

Nor is it sufficient for defendant to say that at the time of this fire there were more than enough bales on hand at Westwego to procure the sending of a ship to take them. It cannot show that if a vessel had been sent there it would not have been filled before this cotton was taken aboard, in which case, as was expressly said by LeBlanc, agent of the Harrison line, if a balance of less than 500 bales were left defendant would have to carry them to New Orleans (p. 52).

Contrary to the fact in the Devato case, if this Westwego dock had been suddenly destroyed, as it actually was, no one in the cotton trade would be affected save defendant. It could still carry its cotton to New Orleans, as it had theretofore done and there deliver it to the steamships.

The whole evidence in the case at bar falls far short of that in the Devato case and does not show that the practice of shipping cotton from Westwego had become "so general and so established as to be fairly and reasonably entitled to be recognized as within" the limits of the port.

It was contended by defendant, in the courts below, that the point of delivery from one carrier to another was of no consequence to the plaintiffs, and that the words "port of New Orleans," as used in the bill of lading, referred solely to the port from which the ship cleared. This contention, however, is unreasonable. The bill of lading specified the route over which this cotton was to be carried and the place at which the transfer from the land to the ocean carrier was to be made, and these shippers had a right to insist upon the following of that route.

As was said in *Bazin* v. *S. S. Co.*, 3 *Wall., Jr.*, 229, at p. 238:

> "Reason or no reason he [the shipper] had a right to have his contract fulfilled according to its stipulations."

If "the port of New Orleans" did not include Westwego, as we contend, defendant had no more right to take this cotton there for delivery to the steamship than it had to carry it fifty or one hundred miles up or down the river and there deliver it. As well might the defendant claim that the cotton need not be taken to the port of New Orleans at all, and that so long as the ship cleared from that port the cotton might be carried to Port Eads for delivery.

In *Graff vs. Blumer*, 9 *Pa. St.*, 114, defendants *as carriers* in April, 1845, received goods in New York directed to Galena, Illinois, to be delivered in *Pittsburg* to a connecting carrier. When the goods arrived at Allegheny they were deposited in a warehouse there, temporarily occupied by the defendant while the new acqueduct across the river to Pittsburg was being built, and were there destroyed by fire, there having been no opportunity for shipping the goods down the river after their arrival. *The defendant and all other companies concerned in this trade had occupied warehouses in Allegheny since the preceeding September, and during this period the warehouse in Pittsburg was disused.*

The Court, Bell, *J.*, said:

"It is settled that if a carrier stipulates to deliver articles at a particular town or warehouse and does so deliver them, he is exonerated from subsequent loss, though they never come to the possession of the consignee or owner * * * (citing Garside *v.* Trent and Mersey Nav. Co., 4 T. R., 581 Rep., and Ackley *v.* Kellogg, 8 Cowen, 223). In order to bring themselves within the saving efficacy of this rule, the defendants insist that *though not literally, they substantially fulfilled the engagement* by the delivery at the warehouse in Allegheny, a place in the immediate vicinity of the warehouse in Pittsburg, and in fulfillment of their contract to be consider as parcel of the latter city, being generally so considered and treated by persons residing at a distance. * * *

But there is no proof that the plaintiff knew anything connected with the subject *other than was disclosed by the contract itself*, and the ready answer to the defendant's position is that they undertook to deliver at Pittsburg, and not at Allegheny. It has been repeatedly ruled that *delivery at a point or place in close proximity with the place stipulated will not relieve the carrier from his responsibility as such, mere propinquity of delivery is no delivery.* * * * (Citing cases).

* * * *How can we tell whether the plaintiffs would have agreed to a delivery of their goods in a warehouse in Allegheny City? There might have existed many reasons to deter them and a decision binding them to it would be not to vindicate the contract entered into, but to make a new one;* it is certain the defendants knew they were not in actual occupancy of their Pittsburg warehouse when they made this agreement. If, from this, or any other cause it was inconvenient or improper to deposit goods there, they should not have so undertaken, but having done so they assumed every risk attendant upon their noncompliance, and it is not for us upon the strained notion that distant places may from their nearness be regarded as one, to take from the plaintiffs the advantage the

> law affords them. Their reply to the defendanss that Allegheny is not Pittsburg is unanswerable and fixes them for the value of the goods spoiled. * * *
>
> The question is not of delay of delivery —*it is a question of destruction in transitu before delivery* made, for which no legal excuse is tendered,"

In *Isaacson* v. *Williams*, 26 *F. R.*, 642, the Court well said:

> "If a usage is general, both parties are presumed to know it and to contract in reference to it. If it is special and confined to a particular port only there is no such presumption."

and, again, in *The Innocenta*, *Fed. Cas. No.* 7050:

> "To make a custom of the port, the rule must be so generally known and acknowledged and acted upon, as virtually to be applied by the whole of that part of the business community which it would affect."

In *Hostetter* vs. *Park*, 137 *U. S.*, 30, a case which seems to be relied upon by the defendant herein, it is said:

> "A deviation is defined to be a voluntary departure without necessity or reasonable cause from the regular and usual course of a voyage in reference to the terms of a policy of reinsurance, but it is no deviation in respect to such a voyage to touch and stay at a port, if such departure is within the usage of the trade."

The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the shipper, and

> "It is well settled that parties who contract on a subject matter concerning which no usages prevail, incorporate such usages by implication into their agreements if nothing is said to the contrary."
>
> *Hostetter* vs. *Park* (*supra*).

But in that case the usage was found to be the general usage in the Pittsburgh and New Orleans barge trade, *coeval with the commencement of the business and constantly practiced* where cargo is to be taken *en route* to the port of destination at several points in the same neighborhood, &c.

If it had been a general usage for steamers loading at New Orleans to go to Westwego, that case would be an authority, but as nothing of the kind appears in the case at bar, and as this alleged usage or custom was of only one season's existence, and there is no pretense that it was a general or long established usage, the *Hostetter* case is not in any respect an authority adverse to any position contended for by the plaintiff.

The merchants did not recognize Westwego as in the port. Their testimony is clear. No one of them considered Westwego as commercially within the port. Yet they were on the ground. They knew Westwego and its relation to the port; they were all merchants of New Orleans of long experience in business there and were familiar with the port. The steamship agents, who were the only ones who ever went there, did not recognize it as in the port, and would not go there, except for a certain quantity of freight, and this fact defendant recognized. As was said by Mr. Hammond:

> "It was always tacitly understood that I would not go there for less than one thousand bales, *and they never demanded that I should*" (p. 56).

In *Young* v. 14,000 *Hard Bricks*, 98 F. R., 149, it is said:

> "Every custom, in order to become obligatory, whether local or general, must be so well known and understood that it may fairly be presumed, that all persons engaged in that trade are acquainted with it and assent to it. To be obligatory it must not be merely a loose practice, but precise, definite and certain, so as

> to supply the place of the common law in the given case and be capable of being applied to the contract in defining and fixing the rights of the parties under it."

There is no proof from which the inference could be drawn that these plaintiffs were acquainted with defendant's peculiar system of dividing its cotton between Westwego and New Orleans; or that they assented to it. Not one witness would acknowledge that he considered Westwego as commercially within the port.

All the ship agents state that by the custom of the port of New Orleans, as it existed in November, 1894, a shipment of 100 bales of cotton would have to be carried to the city front in New Orleans before they would accept a delivery of it.

The shipment in this case was of only 100 bales, and the contract was made with reference solely to that number.

It is unreasonable to suppose, without a syllable of evidence to support it, that these shippers understood, when receiving this bill of lading, that their cotton would be carried to Westwego, a comparatively new and unknown point of delivery, to be there held, solely for defendant's benefit, until it should accumulate enough cotton at that point to procure the sending of a ship to take delivery there.

The contention of the plaintiffs does not call for an unreasonable construction of the word "port" as used in this bill of lading, but they insist that it is reasonable and just to hold that, as used here, the word did mean

> "those limits wherein the merchants of the port ordinarily receive and vessels ordinarily discharge such goods."
>
> *Derala case, supra.*

The defendant knew when the shipment was received that it intended to take this cotton to Westwego; it likewise knew that it must be

held there till a sufficient accumulation was on hand to enable it to procure the sending of a vessel to which delivery thereof could be made. Yet not one word of this was spoken to the shipper. His cotton was received marked to be transported "to the port of New Orleans." It never reached "the port of New Orleans," because defendant deviated, not only from the language, but from the spirit of its contract, and such deviation was material in that it caused the absolute loss of the cotton. We therefore submit that, for that loss, the defendant should be held liable.

(*C.*) Irrespective of the geographical position of Westwego and of the question whether *any* delivery there was a proper one, we submit that this cotton was not treated by the defendant in accordance with the custom and usage of the port of New Orleans.

These carriers had secretly, behind the back of the shippers, arranged that this cotton could be shipped on a steamship at any time in three months, from October 24 (p. 176), and that there was no obligation on the Steamship Company to take it at Westwego at any time within such three months until two thousand bales had accumulated.

There can be no pretense that the evidence shows that such a new and unusual course of business coincided with any custom of the port. It was conclusively shown to be in the very teeth of the custom (p. 109) But if such departures from the ordinary, usual method of handling cotton, taken without the slightest knowledge on the part of the plaintiffs, were not clearly such deviations from the usual methods of transportation as to take from the carrier the benefit of any exemption contained in the bill of lading in his favor, certainly the burden of proof was upon the defendant to show that they were not.

The Bill of Lading, clause 11 (p. 172), contemplates that the cotton should go forward on the first steamer leaving New Orleans after the arrival of the cotton there.

Had this cotton been taken even to New Orleans instead of to Westwego, and there held for three months for the ship's convenience and until 2,000 bales were accumulated, it surely could not be pretended that this would have been within the custom of the trade.

Third Point.

The judgment appealed from should be reversed.

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